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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 566

JOSEPH A. WHITE, JR., ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on May 16, 1969.[1]

### CITATIONS TO OPINIONS BELOW

Petitioners first filed complaint for reformation of the deed in the District Court for the Northern District of California. This was dismissed without prejudice and petitioners thereafter filed a complaint in the same court in mandamus and declaratory relief. On

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[1] Petitioners are Joseph A. White, Jr., Lois M. White, Anthony J. DeMetro, Betty J. DeMetro, Anthony Enea, Rose Enea, Frank A. Siino and Mary Siino.

motion of the respondent the suit was dismissed. Appeal was taken to the Court of Appeals for the Ninth Circuit and the opinion is reported at 343 F2d 444. Appeal was denied and petitioners then filed a complaint for damages for breach of contract in the United States Court of Claims. A copy of the Commissioner's report and of the opinion and decision of the Court of Claims are printed in Appendix A and B.

## JURISDICTION

The judgment of the United States Court of Claims was entered on May 16, 1969. The jurisdiction of the court is invoked under 28 U.S.C. Section 1255(1).

## STATEMENT

The respondent, pursuant to a disposal plan for surplus government property, disposed of that area formerly known as Camp Stoneman in Pittsburg, California. Included in the property to be disposed of was a 52 ± acre area designated by the respondents as parcels M-1 and M-2.

The respondent offered to sell these parcels subject to the reservation of two railroad easements each 20 feet in width along the entire northerly 80 feet of the property. The only public road providing access to the entire parcel is across the railroad easements and from the public road known as California Boulevard.

The petitioners and the respondent agreed upon the terms of the sale including the reservation by the respondent of the two twenty foot wide railroad easements. During these negotiations the petitioners were advised by the respondent's realty officer that access to the parcels would be from anywhere along California Boulevard.

Unbeknownst to the petitioners, the respondent was, at the same time, negotiating to sell the two 20 foot railroad easements (along with other railroad easements and trackage) to the Southern Pacific Railroad Company. The final terms and conditions of this agreement for sale to the Southern Pacific Railroad Company were accepted by the respondent but this agreement has not yet been consummated because of other title problems that developed and have not yet been cleared. The court found that the Southern Pacific Railroad Company included in the descriptions which they prepared, a railroad easement 79 feet in width (instead of two 20 foot easements) along the entire northerly boundary of the property purchased by the petitioners, instead of the two 20 foot railroad easements agreed upon between the petitioners and the respondent.

Without the knowledge or consent of the petitioners, respondent delivered a deed to the title company for recording, describing the reserved railroad easement as 79 feet in width instead of the two 20 foot railroad easements as agreed upon. Petitioner first learned of the breach of its agreement with the respondent while negotiating for the sale of a portion of the real property to an industrial user. Demand was made upon the respondent for a corrected deed which was refused. Although respondent continues to own the reserved railroad easements they directed petitioners to carry on all discussions and negotiations for access to the real property with the Southern Pacific Railroad Company.

The Southern Pacific Railroad Company first agreed to a private driveway crossing over the railroad easement. This was later rescinded when the Operations Department of the Southern Pacific Railroad Com-

pany noted that they had plans for the construction of two additional sets of railroad tracks in order to establish and create a railroad car storage area. The Southern Pacific Company then prepared a plan whereby access would be provided by way of two public roadways at each end of the porperty in question, with elaborate crossing signalization, and with a new frontage public road to be constructed on the southerly side of the property, all to be at the expense of the petitioners.

## REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims is totally irreconcilable with the findings of fact of the same court. Both the Commissioner and the Court apparently recognize this difference in the judgment and the findings for both are noted to make the following statement: "The court has a difficult problem, however, in connection with the determination of the amount due the plaintiffs because of the defendant's wrongful action."

The irreconcilability of the judgment of the court with the findings is best illustrated by a side by side comparison of the findings:

| *Finding No. 34a, b, c & d* | | *Finding No. 36a, b, c & d* | |
|---|---|---|---|
| CONTRACT WITH NO BREACH | | CONTRACT AS BREACHED | |
| 46.35 Usable Acres<br>Value per acre—$10,000 | | 37.76 Usable Acres<br>Value per acre—$10,000 | |
| Total Value | $463,500 | Total value | $377,600.00 |
| Less development costs | —156,635 | Less development costs | —244,932.96 |
| Gross profit | $306,865 | Gross profit | $132,667.04 |
| Less cost of land | —140,000 | Less cost of land | —140,000.00 |
| Net profit | $166,865 | Total loss | ($ 7,442.96) |

Obviously the court's findings (No. 34 and No. 36) do not find realization in the judgment.

Petitioners lost 8.59 acres of land (46.35 minus 37.76) valued at $10,000 per acre for a total loss of $85,900.00.

Additionally, plaintiffs must expend an additional $84,297.96 in development costs by reason of the breach of contract. ($244,932.96 minus $156,635.00).

It is impossible to calculate a $7,300 loss in light of the foregoing. Petitioners' profit of $166,865 has vanished and now, some seven years later and after the expenditure of thousands of dollars in attorneys' fees and court costs, petitioners find themselves in the position that with total development of the property, and its hoped for sale, they will realize absolutely no return. In effect the Court of Claims by its decision is allowing the fraudulent vendor to lose absolutely nothing by its breach of contract. In this regard it is respectfully submitted that even if the Court of Claims had followed the "out of pocket" rule of damages as opposed to "loss of bargain" the court should have awarded the following:

| | |
|---|---|
| a. Loss of 8.59 acres at $10,000 per acre | $ 85,900.00 |
| b. Additional development costs by reason of breach of contract ($244,932.96 minus $156,635.00) | 84,297.96 |
| Total | $170,197.96 |

2. The decision of the Court of Claims permits the respondent to benefit from its own wrongful, intentional and legally fraudulent act at the expense of

the petitioners and contrary to the applicable rules of law.

The court and the Commissioner both found that the respondent had the choice of which agreement it wished to breach; one with the petitioners which was fully executed and the second with the Southern Pacific Railroad Company which is to this date executory. Petitioners demanded a corrected deed of the respondent and were refused. Petitioners then filed a complaint in mandamus to compel the issuance of a corrected deed and carried this matter through appeal, only to be denied such remedy. The respondent therefore, following the old and overly protective theory of governmental immunity, effectively maneuvered the petitioners to a limited right for damages.

Additionally it should be noted that petitioners did not have available to them the right of access by private crossing guaranteed them under the terms of the California Public Utilities Code Section 7537 (quoted in the decision of the court). The respondent had not legislatively consented to be named in proceedings before the California Public Utilities Commission on the one hand, and the Southern Pacific Railroad Company was not the legal owner of the railroad easements on the other hand.

The court and the Commissioner both made findings that there were discussions between the petitioners and the respondent relating to access to the real property in question before the contract between the parties was executed. These discussions and representations took place at a time when the respondent knew (but petitioners did not know) that they were negotiating with the Southern Pacific Railroad Company for the sale of a 79 foot railroad easement and not two 20 foot rail-

road easements as represented and contracted to with the petitioners. Despite this the court found in relation to these discussions as follows: "We do not read it as meaning that Mr. Prendergast said the access would be anywhere along California Boulevard or at an unlimited number of points." The court apparently attempts to reconcile this statement with the facts by noting that the sale was "AS IS" and "WHERE IS". This position of the court is entirely contrary to the position of the same in the case of *Pikesville Home Builders, Inc.* v. *United States*, 160 Ct. Cl. 541 (1963), where the court said, "the defendant, therefore, must be bound by the actions of and the statements of the duly authorized agency." The same court made the following statement in that decision, "We like to think that when the government makes representations to its citizens its declarations can be relied upon. This is as it should be."

By contrast, in the case at hand, the court found not just a simple mistake, but rather what must be classified as an intentional delivery of a deed with a description contrary to that agreed upon; and that the respondent knew that the Southern Pacific Railroad Company wanted a 79 foot easement in order that it might construct two additional sets of railroad tracks and thereby create a railroad storage area. Despite this knowledge on the part of the respondent these facts were not revealed by the respondent to the petitioners during their discussions relating to access.

The decision of the court below in the instant case, failing to specifically find the intentional, bad faith, fraudulent breach of contract by the respondent, resulted in the failure to make a finding of fact on a material issue.

A discussion of this question of fraud in sale cases is found in the case of *Stern* v. *National City Co.*, 25 F. Supp. 948:

> " 'Fraud may be classified as actual and constructive . . . Actual fraud is intentional fraud. It consists of deception, intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed . . . Constructive fraud is a breach of a legal or equitable duty, which irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.' *26 C.J. 1060, 1061*"

> "Legal fraud" and "fraud in law" are frequently regarded as synonymous with "constructive fraud".

> *37 C.J.S. 214, Fraud, Section 3.*

Representations as to boundaries and location of realty have generally been held actionable whether they are knowingly or innocently false or were made without knowledge or in culpable ignorance as to the truth. The application of these rules was reviewed by the court in *State* v. *Farnell*, 239 F. 2d 750. To summarize, the court found that representations concerning area and boundaries of property conveyed are deemed for purposes of establishing fraud, to be material representations of fact; that under California law a single material misrepresentation would suffice to establish the element of fraud; and that under California law, a cause of action for negligent misrepresentation is a form of deceit, and scienter is not an essential element but a finding of negligence is sufficient. This is the rule of a majority of jurisdictions.

The foregoing leads to the question which is the crux of the petitioners writ for certiorari, namely, what is the measure of damages and did the Court of Claims correctly calculate damages?

Under the decision of the Court of Claims there was a complete failure even to follow the "out of pocket" rule of damages. As pointed out in Williston in his work on Contracts (Volume 5 Section 1392) the inequity in fraud in sale cases in following the "out of pocket rule" as the exclusive measure of damages is that a fraudulent person can in no event lose anything by his fraud. He runs a chance of making a profit if he is successful in carrying out his plan and is not afterwards brought to account for it; and if he is brought to account, he will lose nothing by his conduct.

The decision of the court below not only fails to require the respondent to account for the profit that the petitioners would have made but for the fraudulent actions of the respondent's officers, but also fails to require the respondent to account for the value of the loss in land and the additional development costs.

The concise summary of the petitioners position in this matter is found in the case of *Shaw* v. *Union Escrow, etc.,* 53 Cal. App. 66; 200 Pac. 25:

> ". . . a case closely in point is that of Sweem v. Steele, 5 Iowa, 352. The court there said.: "if the person selling is honest, and is prevented from making the conveyance by unforeseen causes, and which he could not control, the plaintiff should recover only nominal damages. But if the person selling is in fault, and either did or should have known that he could not comply with his undertaking; or having the title at the time of the agreement, afterward disables himself from completing

it, by sale to a third person; or, at the time of the agreement knew he had no title—in these, and in all cases where the inability arises from fraud in the covenator, the purchaser should recover substantial damages, including compensation for any actual loss, as by the increased value of the land to the time the contract should have been executed." (Citing cases) To our mind the code provisions have added nothing to the law already established when it is declared that in case only of bad faith on the part of the vendor, damages may be recovered because of profits which might have accrued to the purchaser."

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

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IN THE UNITED STATES COURT OF CLAIMS

No. 32-66

(Filed October 15, 1968)

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JOSEPH A. WHITE, JR., ET AL. v. THE UNITED STATES

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REPORT OF COMMISSIONER TO THE COURT*

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*Alfred A. Affinito,* attorney of record for plaintiffs.

*Howard O. Sigmond,* with whom was *Assistant Attorney General Clyde O. Martz,* for defendant.

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MEMORANDUM OPINION

WHITE, *Commissioner*: This case involves an alleged breach by the defendant of a contract in which the defendant agreed to sell certain surplus realty to the plaintiffs.

It is my opinion that the plaintiffs are entitled to recover, since the evidence in the record clearly shows that the defendant breached the contract between the parties. The court has a difficult problem, however, in connection with the determination of the amount due the plaintiffs because of the defendant's wrongful action.

The realty with which the court is concerned in the present case consists of two parcels of land which formerly were part of the Camp Stoneman Military Reservation in

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*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57(a).

Pittsburg, California. Camp Stoneman was declared surplus to the needs of the United States sometime prior to 1960, and procedures to provide for the disposal of the surplus property were initiated by the defendant's General Services Administration (GSA). Under the disposal plan prepared by the GSA, certain lands within the main cantonment portion of Camp Stoneman were set aside for conveyance to local governmental bodies as sites for schools, parks, and arterial streets; and the remainder of the Camp Stoneman area was divided into parcels for the purpose of sale.

Two of the Camp Stoneman surplus parcels were designated as M-1 and M-2. They are contiguous and together form an area that resembles a modified right-angle triangle, with a south side extending approximately 3,200 feet from west to east, an east side extending approximately 1,200 feet from south to north, and a hypotenuse which extends approximately 3,000 feet from northeast to southwest but fails to meet the south side of the "triangle," so that there is actually a small, curved west side of the area. The area is bounded on the south side by a limited-access freeway maintained by the State of California, on the east side by private property, and on the north side (i.e., the hypotenuse) by a public street that is known as California Boulevard.

Parcel M-1 contains 11 acres and is located in the western portion of the triangular area previously mentioned. Parcel M-2 contains 40.9 acres and occupies the eastern portion of the triangular area.

Parcels M-1 and M-2 are located outside the main cantonment portion of Camp Stoneman, and they are separated from the main cantonment portion by the limited-access freeway previously mentioned. The freeway bounds parcels M-1 and M-2 on the south and bounds the main cantonment on the north. Parcels M-1 and M-2 do not have access to the freeway.

Parcels M-1 and M-2 are zoned "Industrial" by the City of Pittsburg. They are the only parcels with such a zoning among the many parcels into which Camp Stoneman was divided.

Two sets of railroad tracks are located on parcels M-1 and M-2. The tracks run along most of the north boundary of the two parcels and are near California Boulevard. The two sets of tracks are located approximately 40 feet apart at the western end of parcel M-1, and they run parallel to a point near the eastern boundary of parcel M-2, where they converge into one track. The two sets of tracks and the area between them cover a strip of land approximately 79 feet wide on the north side of parcels M-1 and M-2. The tracks were used by the Southern Pacific Company to provide transportation services for Camp Stoneman when it was an active military installation.

At the time when parcels M-1 and M-2 were offered for sale by the GSA, no crossing of the railroad track on the parcels had been established, and the tracks effectively separated the remainder of the two parcels from California Boulevard.

A contract was entered into between the defendant (represented by the GSA) and the plaintiffs on June 8, 1962, under which the defendant agreed to sell and the plaintiffs agreed to buy parcels M-1 and M-2 for a price of $140,000.[1] With respect to the two sets of railroad tracks on parcels M-1 and M-2, the contract provided in pertinent part as follows:

> *Railroad Easement:* There is reserved and excepted from this sale the existing trackage identified as "A", "I" * * * on the plat attached to the Bid Invitation

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[1] A third parcel, designated as M-4, was also included in the contract. Parcel M-4 is a relatively small and irregularly shaped parcel lying to the east of the northeast corner of parcel M2. The parties have treated parcel M-4 as being without significance in connection with the present litigation.

> together with easements therefore [sic] 20 feet wide for railroad and transportation purposes upon, along, over and across parcels M-1, M-2 * * *.

It will be noted that the defendant contracted on June 8, 1962 to sell parcels M-1 and M-2 to the plaintiffs subject to two 20-foot railroad easements for the two sets of existing railroad tracks on the parcels. However, three months earlier, on March 8, 1962, the defendant had entered into a contract with the Southern Pacific Company whereby the defendant agreed to sell and the SP agreed to buy the existing trackage on parcels M-1 and M-2, together with a railroad easement 79 feet wide covering the two sets of tracks and also the area between the two sets of tracks. Thus, the "Railroad Easement" provision of the contract between the defendant and the plaintiffs, on the one hand, and the contract between the defendant and the Southern Pacific Company, on the other hand, were inconsistent in so far as parcels M-1 and M-2 were concerned.[2] The defendant was faced with the necessity of breaching one of the contracts, and, for reasons that are not disclosed in the record, the defendant elected to breach the contract with the plaintiffs.

A quitclaim deed conveying parcels M-1 and M-2 to the plaintiffs was prepared by the GSA on June 22, 1962. The quitclaim deed stated with respect to parcels M-1 and M-2 that there was reserved to the defendant, its successors and assigns, an easement for railroad and transportation purposes over a strip of land 79 feet wide running along the north side of the parcels and containing the two sets of existing railroad tracks, together with the area between the two sets of tracks.

The quitclaim deed mentioned in the preceding paragraph was delivered by the GSA to the plaintiffs' escrow

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[2] The evidence in the record warrants the inference that this mix-up was due to faulty coordination among the personnel of the GSA, rather than to any intentional wrongdoing on the part of GSA personnel.

agent, Western Title Guaranty Company, on August 8, 1962, with closing instructions. The title transaction was closed and the purchase price was paid to the GSA on September 2, 1962. The deed was recorded by the Western Title Guaranty Company on September 21, 1962. It was forwarded to the plaintiffs by the escrow agent approximately one month later.

Prior to the receipt of the quitclaim deed from their escrow agent, the plaintiffs themselves did not see the deed or receive any actual notice regarding the variance between the description in the deed of the railroad easement on parcels M-1 and M-2, on the one hand, and the "Railroad Easement" provision contained in the contract between the plaintiffs and the defendant, on the other hand.

As a result of the defendant's breach of contract, the narrow strip of land between the two sets of railroad tracks on parcels M-1 and M-2, comprising a total area of 2.6 acres, was conveyed to the plaintiffs subject to a railroad easement, whereas the defendant had agreed in the contract between the parties to convey this narrow strip of land to the plaintiffs free of any railroad easement. Neither side introduced any evidence at the trial with respect to the difference as of September 1962 between the fair market value of the 2.6 acres subject to the railroad easement and the fair market value that the 2.6 acres would have had free of any railroad easement. The lack of such evidence is not surprising, however, since the narrow strip of land between the two sets of railroad tracks probably did not constitute salable acreage as of September 1962, separate and apart from other portions of parcels M-1 and M-2.

As indicated at the outset of this memorandum opinion and in the factual findings, it is difficult to determine the proper amount of the recovery to which the plaintiffs are entitled in this case. However, the evidence does indicate that the defendant's wrongful action in reserving a railroad easement on the narrow strip of land between the

two sets of tracks had some adverse effect on the salability and value of the remainder of parcels M-1 and M-2 lying south of the railroad tracks. While the evidence on this point is not as clear as might be desired, it appears that as of September 1962 parcels M-1 and M-2, subject to the 79-foot railroad easement wrongfully reserved by the defendant, had a fair market value of only about $132,700. Since the plaintiffs paid the defendant $140,000 for the two parcels, and this figure presumably represented the fair market value of the parcels subject to the two 20-foot railroad easements provided for in the contract between the parties, it would seem appropriate to make the plaintiffs financially whole by allowing them $7,300 as damages in the present action.

Accordingly, it is my opinion that judgment should be entered for the plaintiffs in the sum of $7,300.

## Findings of Fact

1.(a) Prior to 1960, the defendant's Camp Stoneman Military Reservation, which consisted of more than a thousand acres of land and was located within the present city limits of Pittsburg, California, was declared surplus to the needs of the defendant, and procedures to provide for the disposal of the area were initiated.

(b) Sam Staakecker, a realty officer employed by the defendant's General Services Administration (GSA) and assigned to the Property Management and Disposal Division, Region 9, San Francisco, inspected Camp Stoneman and prepared a disposal plan respecting the surplus property. Until his resignation in 1960, Mr. Staakecker was responsible for carrying out the disposal plan.

(c) The disposal plan mentioned in paragraph (b) of this finding provided for the employment by the defendant of appraisers to assess the value of the surplus property, the preparation of advertisements to notify the public of the proposed sale, the preparation and distribution of bid

invitations, the opening of bids, the making of awards, and the preparation of deeds and deeds of trust.

2. In November 1960, Robert M. Prendergast joined the personnel of the San Francisco regional office of the GSA as a realty officer, and succeeded to Sam Staakecker's responsibilities with respect to the disposal of Camp Stoneman.

3.(a) Under the disposal plan referred to in finding 1, certain lands within the main cantonment portion of Camp Stoneman were set aside to be deeded to local governmental bodies as sites for schools, parks, and arterial streets.

(b) The remainder of Camp Stoneman was parcellized for the purpose of sale. Such parcels were zoned by the City of Pittsburg for varying uses, including "Industrial," "Controlled Manufacturing," "Administrative & Professional," "Multi-Family Dwellings & Limited Commercial," "Neighborhood Commercial," "Multi-Family Dwellings & Fraternal Organizations," "Duplex Family Residences," and "Single Family Residences."

4.(a) Two of the parcels referred to in finding 3(b) were designated as M-1 and M-2. Parcels M-1 and M-2 are involved in the present litigation.

(b) Parcels M-1 and M-2 are contiguous and together form an area that resembles a modified right-angle triangle, with a south side extending approximately 3,200 feet from east to west, an east side extending approximately 1,200 feet from south to north, and a hypotenuse which extends approximately 3,000 feet from northeast to southwest but fails to meet the south side of the "triangle," so that there is actually a small, curved west side of the area. The area is bounded along the south side by a limited-access freeway maintained by the State of California, on the east by private property, and along the hypotenuse (which, for the sake of convenience, will be referred to hereafter in the findings as the "north" side or boundary)

by a public street that was formerly known as Antioch Road and is now referred to as California Boulevard.

(c) Parcel M-1, consisting of approximately 11 acres, is located in the western portion of the triangular area mentioned in paragraph (b) of this finding. The southern boundary of parcel M-1 constitutes about one-third of the southern boundary of the triangular area.

(d) Parcel M-2, consisting of approximately 40.9 acres, is a modified trapezoid that occupies the eastern portion of the triangular area mentioned in paragraph (b) of this finding. The southern boundary of parcel M-2 constitutes about two-thirds of the southern boundary of the triangular area.

(e) Parcels M-1 and M-2 are located outside the main cantonment portion of Camp Stoneman, and they are separated from the main cantonment portion by the limited-access freeway previously mentioned, which runs from the eastern end of Contra Costa County to the San Francisco Bay area. Parcels M-1 and M-2 are located north of the freeway, while the main cantonment portion is located south of the freeway. Parcels M-1 and M-2 do not have access to the freeway, which forms the south boundary of the two parcels.

(f) California Boulevard, which forms the north boundary of parcels M-1 and M-2, is a public street that is dedicated to public use and is maintained by the County of Contra Costa. Parcels M-1 and M-2 together have approximately 3,000 feet of frontage on California Boulevard, which is the only public street that borders on these parcels.

(g) Parcels M-1 and M-2 are zoned "Industrial" by the City of Pittsburg. They are the only parcels among those into which the former Camp Stoneman was divided with such a zoning.

5.(a) Two sets of railroad tracks, referred to as "drill" tracks, are located on parcels M-1 and M-2. The tracks run

along most of the north boundary of parcels M-1 and M-2, and are near California Boulevard. The tracks are located approximately 40 feet apart at the western end of parcel M-1, and they run parallel to a point near the eastern boundary of parcel M-2, where they converge into one track. The two sets of tracks and the area between them cover a strip of land approximately 79 feet wide on the north side of Parcels M-1 and M-2.

(b) There is room to install two more sets of tracks between the existing tracks.

(c) The tracks were used by the Southern Pacific Company to provide transportation services for Camp Stoneman when it was an active military installation.

(d) There is no crossing of the railroad tracks on parcels M-1 and M-2, and the tracks effectively separate the remainder of the parcels from California Boulevard.

(e) The plaintiffs are local real estate agents in Pittsburg, California; and at all times material to this litigation, they were familiar with the location of the railroad tracks on parcels M-1 and M-2, and with the use that was being made of such tracks.

6.(a) In 1960, after the completion of the appraisals on those parcels within the Camp Stoneman area that were to be sold, the defendant began the process of offering such parcels for sale.

(b) Some of the parcels to be sold were actually offered for sale on three separate occasions. If no acceptable bid, in the light of the appraised value, was received for a particular parcel on the first offering, that parcel was offered for sale at a subsequent time; and if no acceptable bid was received on the second offering, the particular parcel was later offered for sale on a third occasion.

(c) Some of the parcels were sold while Sam Staakecker was in charge of the disposal of the Camp Stoneman prop-

erties. However, most of the parcels remained unsold when Robert M. Prendergast succeeded to Mr. Staakecker's responsibilities in November 1960.

(d) Parcels M-1 and M-2 were included among the first offering of parcels within the Camp Stoneman area for sale by the defendant. However, no acceptable offer for M-1 or M-2 was received at that time.

7.(a) Prior to the first offering of parcel M-1 for sale, personnel of the defendant prepared a description of this parcel which referred to it as being subject to "An easement 20 feet in width granted to the Southern Pacific Company and lying equally on either side of two parallel existing railroad tracks located in the most northerly 80 feet of the * * * parcel."

(b) Prior to the first offering of parcel M-2 for sale, personnel of the defendant prepared a description of this parcel which referred to it as being subject to "An easement 20 feet in width granted to the Southern Pacific Company for railroad purposes and lying equally on either side of two existing railroad tracks located in the most northerly 50 feet of the * * * parcel."

(c) The references in the descriptions of parcels M-1 and M-2, mentioned in paragraphs (a) and (b) of this finding, to railroad easements having been "granted" to the Southern Pacific Company were erroneous, although negotiations were in progress between the defendant and the Southern Pacific Company at the time with respect to the granting to the latter of railroad easements on parcels M-1 and M-2, and also on other parcels within the Camp Stoneman area. (See finding 8.)

(d) The description of the existing railroad tracks on parcel M-2 as being located in the most northerly 50 feet of the parcel (see paragraph (b) of this finding) was erroneous, since the two sets of tracks on parcel M-2, together with the area between them, covered a strip of land approximately 79 feet wide.

8.(a) Beginning as early as 1960, at least, negotiations were undertaken between the defendant and the Southern Pacific Company with respect to the existing railroad tracks, and railroad easements for them, on lands within the Camp Stoneman area, including parcels M-1 and M-2. With regard to the trackage on parcels M-1 and M-2, the defendant desired to sell both of the existing sets of tracks, and a 20-foot easement for each of them, to the Southern Pacific Company in order to assure railroad service to parcels in the main cantonment portion of Camp Stoneman lying west of parcels M-1 and M-2.

(b) During the course of the negotiations referred to in paragraph (a) of this finding, the Southern Pacific Company prepared and furnished to the defendant a plat dated July 27, 1960 (and later revised), depicting (among other things) the two existing sets of tracks on parcels M-1 and M-2, and a proposed railroad easement across parcels M-1 and M-2 for such tracks, the proposed easement being 79 feet wide and covering not only the two existing sets of tracks but also the area between the two sets of tracks.

(c) By means of a letter dated November 14, 1961 and addressed to the GSA regional office in San Francisco, the Southern Pacific Company submitted an offer for the purchase of the two existing sets of tracks, and a railroad easement for them, on parcels M-1 and M-2, together with other trackage and easements on parcels located within the main cantonment area of Camp Stoneman. The railroad easement which the Southern Pacific Company proposed to acquire across parcels M-1 and M-2 was 79 feet wide and covered the two existing sets of tracks, together with the area between the two sets of tracks.

(d) On February 26, 1962, the Southern Pacific Company amended its offer by agreeing "to maintain the existing trackage in its present location for a period of five years from the date of sale to the railroad, unless purchasers of land served by such trackage request relocation or abandonment."

(e) The Southern Pacific Company's offer included two alternative propositions with respect to the payment that would be made for the trackage and easements. Under alternative No. 2, the company offered to make a lump-sum cash payment of $53,518.

(f) Under the date of March 8, 1962, the GSA regional office in San Francisco wrote a letter to the Southern Pacific Company, stating in part as follows:

> General Services Administration hereby accepts your offer presented as Alternative No. 2 in your letter of November 14, 1961, as amended, and supplemented by your letter of February 26, 1962, which includes the purchase of certain trackage and easements at Camp Stoneman, Main Cantonment Area, Pittsburg, California.

9.(a) Pursuant to the agreement made with the Southern Pacific Company (see finding 8), the GSA prepared a document entitled "Easement and Bill of Sale," conveying to the Southern Pacific Company the trackage and easements involved in the agreement. Upon receipt of this document, the Southern Pacific Company caused a title search to be made respecting the easements purportedly conveyed in the document. This search revealed that the defendant had neglected to reserve railroad easements in connection with the prior conveyance of certain lands within the main cantonment area of Camp Stoneman, as to which the document entitled "Easement and Bill of Sale" purported to convey railroad easements and trackage to the Southern Pacific Company. Because of this, the Southern Pacific Company refused to accept title under the "Easement and Bill of Sale," or to make any payment to the defendant, until the title defects were corrected.

(b) Efforts by the defendant to obtain railroad easements on the parcels within the main cantonment area which the defendant had conveyed without reserving such easements have been unsuccessful.

(c) The document entitled "Easement and Bill of Sale" has never been recorded.

(d) Notwithstanding the failure of the defendant and the Southern Pacific Company to consummate the agreement, the Southern Pacific Company has continued to use the two sets of railroad tracks running along the north side of parcels M-1 and M-2 in order to provide transportation services for the owners of lands situated west of parcels M-1 and M-2, in what was formerly the main cantonment portion of Camp Stoneman. The present railroad traffic into the Camp Stoneman area amounts to approximately 7 or 8 cars a month, which is minimal in relation to the potential of the area.

(e) The tracks on parcels M-1 and M-2 have also been used by the Southern Pacific Company during recent years for the storage of freight cars.

10.(a) Sometime in the spring of 1962, the defendant again invited bids for the purchase of parcels M-1 and M-2,[1] as well as 46 other parcels within the Camp Stoneman area. This offering included a total of approximately 555.7 acres.

(b) The invitation for bids contained, *inter alia*, a paragraph stating in part as follows:

> *Railroad Easement:* There is reserved and excepted from this sale the existing trackage identified as "A", "I" * * * on the plat attached to the Bid Invitation together with easements therefore [sic] 20 feet wide for railroad and transportation purposes upon, along, over and across parcels M-1, M-2 * * *.

(c) The railroad tracks designated as "A" and "I" in the "Railroad Easement" paragraph of the invitation for bids, partially quoted in paragraph (b) of this finding, were the same two sets of tracks previously mentioned in find-

[1] The record before the court is not clear as to whether this was the second or the third offering of parcels M-1 and M-2 for sale.

ing 5 as being located on, and as running along the north side of, parcels M-1 and M-2, near California Boulevard, and mentioned in finding 8 as being involved in a contract of sale between the defendant and the Southern Pacific Company. Track "A" was the track nearest to California Boulevard.

(d) The invitation for bids contained "Instructions to Bidders," stating in part as follows:

> 2. All bids submitted shall be deemed to have been made with full knowledge of all terms, conditions, and requirements herein contained.
>
> 3. *Inspection of Property.* The premises are now subject to inspection by prospective bidders. * * * The failure of any bidder to inspect or to be fully informed as to the condition of all or any portion of the premises or property offered, will not constitute grounds for any claim or demand for adjustment or withdrawal of a bid after opening.

(e) The invitation contained "General Terms and Conditions," stating in part as follows:

> 2. *Sold "AS IS" and "WHERE IS."* The descriptions and locations of the premises, facilities, and property named in the foregoing Invitation are believed to be sufficiently specific for purposes of identification. Any error or omission in such description shall not constitute any ground or reason for non-performance of the contract or claim by the successful bidder for any allowance, refund, or deduction from the amounts offered. A complete description of the property with all exceptions, reservations, and restrictions is available at the General Services Administration office where this bid is to be submitted and all bids submitted will be on the basis of such complete description. The Government does not make any guaranty or warranty, express or implied, as to the quantity, quality, character or condition, size or kind, thereof; or that same are in condition or fit to be used for the purpose for which intended.
>
> * * * * * *

5. *Agreement of Sale.* The foregoing Invitation, with all the instructions, terms and conditions set forth herein, and the Bid, when accepted by the Government shall constitute an agreement of sale between the successful bidder and the Government. Such agreement together with terms contained in the security instruments shall constitute the whole contract, to be succeeded only by the formal instruments of transfer * * *.

* * * * * *

13. *Conveyance of the Property.* If a bid for the purchase of the real property is accepted, conveyance of the Government's interest therein will be made by Quitclaim Deed being without warranty, express or implied.

(f) The invitation for bids stated that sealed bids would be received at the GSA Business Service Center in San Francisco or the GSA Business Service Center in Los Angeles until 11 a.m. on May 3, 1962, at which time they would be publicly opened and read.

(g) The invitation for bids also stated that GSA "reserves the right to reject any or all proposals."

11. Robert M. Prendergast (see finding 2) was responsible for the preparation and issuance of the invitation for bids referred to in finding 10.

12.(a) The plaintiff Joseph A. White, Jr., is a real estate broker and investor, operating under the name of Los Medanos Realty Company. He began his realty career as a salesman in 1949, and he received his broker's license in the early 1950's. His office has generally been located in the Pittsburg area of Contra Costa County, California. As broker for Los Medanos Realty Company, he has handled many real estate transactions, and has become familiar with local property, in the Pittsburg area.

(b) In 1962, the plaintiff Anthony J. DeMetro was a licensed real estate salesman employed by Los Medanos Realty Company.

(c) In 1962, the plaintiff Anthony Enea was in the employ of Los Medanos Realty Company, functioning as an associate broker.

(d) In 1962, the plaintiffs Joseph A. White, Jr., Anthony DeMetro, Anthony Enea, and Frank A. Siino, a business associate of Joseph A. White, Jr., formed a syndicate for the purpose of bidding on parcels M-1 and M-2 in the Camp Stoneman area.

13.(a) Prior to the May 3, 1962 deadline for the submission of bids in response to the invitation mentioned in finding 10, the plaintiff Anthony J. DeMetro visited the GSA project office at Camp Stoneman and obtained copies of the descriptions of parcels M-1 and M-2 that had been prepared in connection with the first offering of these parcels for sale (see finding 7). The evidence indicates that the furnishing to Mr. DeMetro of descriptions prepared in connection with a prior offering of the parcels for sale was inadvertent on the part of the GSA project office personnel. The plaintiffs did not obtain from the GSA Business Service Center in San Francisco or the GSA Business Service Center in Los Angeles copies of the descriptions of parcels M-1 and M-2 that had been prepared in connection with the then-current offering of these parcels for sale.

(b) Mr. DeMetro also obtained information concerning the procedure for the submission of sealed bids in response to the invitation referred to in finding 10.

(c) Mr. DeMetro asked how the purchaser of parcels M-1 and M-2 would gain access to a public street or highway, and was informed that the purchaser of the parcels would have access to California Boulevard.

14.(a) The plaintiffs arranged to have the Western Title Guaranty Company make a title report respecting parcels M-1 and M-2. The title company submitted to the plaintiffs a preliminary title report dated April 6, 1962.

(b) With respect to parcel M-1, the preliminary title report indicated that the title company had notice, from

correspondence in its files, regarding an unrecorded railroad easement 20 feet in width granted to the Southern Pacific Company and lying equally on either side of two parallel railroad tracks located in the most northerly 80 feet of parcel M-1.

(c) With respect to parcel M-2, the preliminary title report indicated that the title company had notice of an unrecorded 20-foot easement granted to the Southern Pacific Company for railroad purposes and lying equally on either side of two existing railroad tracks in the most northerly 50 feet of parcel M-2.

15.(a) On May 3, 1962, the plaintiffs submitted to the GSA Business Service Center in San Francisco a bid in the amount of $86,979 on three of the parcels included in the invitation for bids referred to in finding 10. The three parcels on which the plaintiffs submitted a bid were designated as M-1 and M-2, mentioned in previous findings, and M-4, a relatively small and irregularly shaped parcel lying to the east of the northeast corner of parcel M-2. Parcel M-4 is not involved in the present litigation.

(b) Sometime between May 3 and 17, 1962, the GSA sent a telegram to the plaintiffs, stating (among other things) that "All bids are still under consideration"; that "Prior to making decision on any bid, high bidders are being afforded opportunity to increase their bids"; and that "If you wish to increase your lump sum bid on parcels M-1, M-2, M-4, such increased bid should be in letter addressed to this office postmarked not later than May 17 * * *."

16.(a) After receiving from the GSA the telegram referred to in finding 15(b), the plaintiffs Joseph A. White, Jr., and Anthony J. DeMetro went to see Robert M. Prendergast and had a conference with him. Mr. White acted as the principal spokesman for the plaintiffs at the conference.

(b) Mr. White inquired of Mr. Prendergast regarding the amount by which it would be necessary for the plaintiffs

to increase their bid in order to make the bid acceptable. Mr. Prendergast replied that he could not state any figure, and that the plaintiffs would have to use their own best judgment regarding the amount of the increase in the bid.

(c) Mr. White also asked whether the defendant's appraisal report concerning parcel M-2 had given any value to a couple of incinerators that were located on parcel M-2. Mr. Prendergast was unable to answer this question at the moment, and told Mr. White that the desired information would be obtained. Later, Mr. Prendergast checked the appraisal report and then told Mr. White that such appraisal had given a value for the incinerators.

(d) In addition, Mr. White raised a question with Mr. Prendergast as to how the purchaser of parcels M-1 and M-2 would gain access to and from such parcels, in view of the circumstance that they were bounded on the south by a limited-access freeway and on the east by private land, and the two existing sets of railroad tracks that ran along the north side of parcels M-1 and M-2 effectively separated the remainder of the two parcels from California Boulevard. Mr. Prendergast stated, in effect, that the purchaser of parcels M-1 and M-2 would not have any access to the freeway; that the purchaser of these parcels would have access to California Boulevard; and that there would be no problem in obtaining access to California Boulevard from parcels M-1 and M-2.

(e) Messrs. White and DeMetro testified at the trial that they understood from Mr. Prendergast's comments, as summarized in paragraph (d) of this finding, that the purchaser of parcels M-1 and M-2 could have as many crossings of the railroad tracks as might be desired; that such crossings could be placed wherever the purchaser might desire them; and that the purchaser would have complete discretion to determine the nature of the warning devices that would be installed at the crossings for the protection of persons and vehicles using the crossings. Such an under-

standing was unreasonable, since the invitation for bids expressly stated that the two existing sets of railroad tracks on parcels M-1 and M-2, together with 20-foot easements for railroad and transportation purposes, were reserved from the offering. This clearly implied that active railroad operations would continue on the existing railroad tracks. Crossings of the tracks without limitation or restriction as to number, location, or warning devices would have been incompatible with continued active railroad operations on the tracks.

17.(a) After the conference mentioned in finding 16, and in response to the telegram referred to in finding 15(b), Joseph A. White, Jr., acting for himself and the other plaintiffs, sent a letter to the GSA on May 17, 1962, stating in part as follows:

> I desire to increase the amount of my bid [on parcels M-1, M-2, and M-4] from $86,979.00 to $140,000.00, which offer is made on the same terms as the original bid.

(b) On June 8, 1962, the GSA sent a letter to the plaintiffs, stating in part as follows:

> The General Services Administration hereby accepts your increased Bid * * * in the amount of $140,000.00 for Parcels M-1, M-2, and M-4, Camp Stoneman.

18. At the time when the plaintiffs purchased parcels M-1 and M-2, these parcels (as well as the other portions of the Camp Stoneman area) were located within the city limits of Pittsburg, California. In a letter dated June 19, 1962, the City Manager of Pittsburg advised the plaintiffs that access to parcels M-1 and M-2 was to be from California Boulevard.

19.(a) A quitclaim deed conveying parcels M-1, M-2, and M-4 to the plaintiffs was prepared by the GSA on June 22, 1962 and was delivered to the plaintiffs' escrow agent,

Western Title Guaranty Company, on August 8, 1962, with closing instructions.

(b) The title transaction was closed and the purchase price was paid to the GSA on September 2, 1962. The quitclaim deed was recorded by the Western Title Guaranty Company on September 21, 1962, and was forwarded to the plaintiffs by the escrow agent approximately one month thereafter.

(c) The quitclaim deed stated with respect to parcels M-1 and M-2 that there was reserved to the defendant, its successors and assigns, an easement for railroad and transportation purposes over a strip of land 79 feet wide running along the north side of parcels M-1 and M-2 and containing the two sets of existing railroad tracks, together with the area between the two sets of tracks.

20. Prior to the receipt from their escrow agent of the quitclaim deed mentioned in finding 19, the plaintiffs themselves did not see the deed or receive any actual notice regarding the variance between the description in the deed of the railroad easement on parcels M-1 and M-2 (see finding 19 (c)), on the one hand, and the "Railroad Easement" provision contained in the contract between the plaintiffs and the defendant (see finding 10(b)), on the other hand.

21. According to the quitclaim deed referred to in finding 19, the plaintiffs Joseph A. White, Jr. (and Lois M. White, his wife), Anthony J. DeMetro (and Betty J. DeMetro, his wife), Anthony Enea (and Rose Enea, his wife), and Frank A. Siino (and Mary V. Siino, his wife) each owns an undivided one-quarter interest in parcels M-1 and M-2.

22.(a) As indicated in finding 4(g), parcels M-1 and M-2 are zoned "Industrial" by the City of Pittsburg, California. The plaintiffs acquired these parcels with the intention of dividing the triangular area which they comprise into industrial lots for the purpose of resale. Accordingly, after acquiring parcels M-1 and M-2, the plaintiffs engaged a

firm of consulting civil engineers and had them prepare in September 1962 a plat dividing the triangular area into 10 lots. These lots—which varied in size from about 4 acres to about 10 acres—were created by drawing lines from the north boundary of the triangular area (along California Boulevard) to the south boundary of the area (along the freeway) at somewhat irregular intervals.

(b) The plan of subdivision referred to in paragraph (a) of this finding contemplated that five crossings of the railroad tracks running along the north boundary of the triangular area would be established by the plaintiffs, each crossing being located at a place which would enable it to serve—and provide direct access from California Boulevard to—two contiguous lots.

23.(a) Shortly after the plaintiffs acquired parcels M-1 and M-2, Johnson S. Bogart, of the firm of Coldwell, Banker & Co., San Francisco industrial realtors, entered into negotiations with the plaintiffs for the purchase of a 5-acre lot in the industrial subdivision referred to in finding 22. Mr. Bogart was acting as purchasing agent for the Stanley Steel Strapping Company, which was interested in establishing a plant in or near Pittsburg, California.

(b) During the course of the negotiations mentioned in paragraph (a) of this finding, Mr. Bogart and the plaintiff Joseph A. White, Jr., conferred with Dudley C. Dado, of the Industrial Department of the Southern Pacific Company, about obtaining permission for the establishment and maintenance of a private crossing of the two sets of railroad tracks along the north boundary of the subdivision, such crossing to be located so that it would provide direct access from California Boulevard to the 5-acre lot tentatively selected on behalf of the Stanley Steel Strapping Company and to a contiguous lot. (A private railroad crossing is one that is maintained by a private person or persons—as distinguished from a governmental unit—and can be used only with the express or implied permission of such

person or persons.) Mr. Dado informed Messrs. Bogart and White that the Industrial Department approved the proposal and would recommend to higher authority that the Southern Pacific Company grant permission for the establishment and maintenance of the requested private crossing.

(c) After the conversation referred to in paragraph (b) of this finding, a 90-day option was taken on behalf of the Stanley Steel Strapping Company for the acquisition of the 5-acre lot at a price of $50,000. During the 90-day period of the option, Coldwell, Banker & Co. engaged a soils engineer to make a soils report, and arranged to have the 5-acre lot surveyed.

(d) At the end of the 90-day option period, the option to buy was exercised on behalf of the Stanley Steel Strapping Company. Under the agreement, the transaction was to be closed within 30 days.

(e) Two days prior to the expiration of the 30-day period for the closing of the transaction between the plaintiffs and the Stanley Steel Strapping Company, Mr. Dado informed Messrs. Bogart and White that the Operations Department of the Southern Pacific Company had disapproved the request for a crossing of the railroad tracks at the desired place, on the ground that a crossing there would interfere with plans of the Southern Pacific Company to construct two additional sets of railroad tracks between the two existing sets of tracks on parcels M-1 and M-2, and to use the area of the easement on those parcels as a yard in which to hold or store railroad cars; and, accordingly, that the pending request for a crossing had been denied by the general manager of the company.

(f) After learning that the Southern Pacific Company would not grant a crossing of the railroad tracks at the place desired by the plaintiffs and the Stanley Steel Strapping Company, the agreement for the acquisition by that company of a 5-acre lot from the plaintiffs was cancelled on behalf of Stanley. The Stanley Steel Strapping Com-

pany subsequently acquired another lot in the Pittsburg area as the site for its new plant.

24. After learning from Mr. Dado that the Southern Pacific Company had denied the request for a crossing of the railroad tracks along the north boundary of the property in order to provide direct access from California Boulevard to the 5-acre lot selected on behalf of the Stanley Steel Strapping Company, the plaintiff Joseph A. White, Jr., sought the assistance of Robert M. Prendergast in connection with a further effort to obtain permission for the desired crossing. Mr. Prendergast talked with D. T. Daggett, of the Industrial Department of the Southern Pacific Company, and was informed that such company was unwilling to grant a request for a railroad crossing at the place desired by the plaintiffs and the Stanley Steel Strapping Company because the Southern Pacific Company planned to construct, in the area of the requested crossing, a yard in which to hold or store railroad cars.

25. At the time of—or reasonably soon after—the refusal of the Southern Pacific Company to grant permission for the establishment and maintenance of a railroad crossing at the place desired by the plaintiffs and the Stanley Steel Strapping Company, the Southern Pacific Company informed the plaintiffs that it would be willing to grant permission for the establishment and maintenance of two railroad crossings in order to provide access from California Boulevard to parcels M-1 and M-2. One crossing, according to the Southern Pacific Company, could be established and maintained near the extreme western boundary of parcel M-1, and the other could be established and maintained near the extreme eastern boundary of parcel M-2. This has been the position of the Southern Pacific Company at all times material to the present litigation.

26.(a) By means of a letter dated July 25, 1963 and addressed to the San Francisco office of the GSA, the plaintiffs complained "that the Deed delivered by your department

was not in accordance with the advertised offer of sale," and that "Instead of reserving an easement for railroad purposes twenty (20) feet in width, your Deed dated June 22, 1962, reserved an easement which is approximately seventy-nine (79) feet in width." The letter included a demand "for a Deed in conformance with the terms and conditions of sale."

(b) The defendant refused to comply with the plaintiffs' demand of July 25, 1963.

27.(a) In August 1963, the Southern Pacific Company suggested to the plaintiffs a plan for the development of the M-1 and M-2 triangular area as an industrial park. The plan contemplated the construction by the plaintiffs of an access road from California Boulevard that would touch all the lots in the area by crossing the railroad tracks near the northeast corner of the area, proceeding southward along the east side to the southeast corner of the area, running westward along the south side to the southwest corner of the area, and then crossing the railroad tracks to California Boulevard near the southwest corner of the area.

(b) The plan mentioned in paragraph (a) of this finding was not adopted by the plaintiffs because they had reason to believe that the expense involved in constructing the proposed access road, and the acreage covered or made unusable by the road, would have made it impossible to develop and sell the lands within parcels M-1 and M-2 at a profit.

28.(a) On October 14, 1963, the plaintiffs filed an action (No. 41832) in the United States District Court for the Northern District of California, Southern Division, seeking a reformation of the deed dated June 22, 1962, in so far as it related to parcels M-1 and M-2.

(b) The action referred to in paragraph (a) of this finding was dismissed by the District Court without prejudice on jurisdictional grounds.

29.(a) On February 17, 1964, the plaintiffs instituted in the United States District Court for the Northern District of California, Southern Division, an action (No. 42116) in mandamus and for declaratory relief with respect to the failure of the GSA to issue a deed respecting parcels M-1 and M-2 in conformity with the contract between the plaintiffs and the defendant for the purchase and sale of these parcels.

(b) The action referred to in paragraph (a) of this finding was dismissed by the District Court on jurisdictional grounds, and the dismissal was upheld by the United States Court of Appeals for the Ninth Circuit (343 F.2d 444).

30.(a) In 1964, the Signode Steel Strapping Company, which desired to construct a new facility in or near Pittsburg, California, made an offer to the plaintiffs for the purchase of a block of lots totaling 20 acres within the industrial subdivision mentioned in finding 22, at a price of $12,500 per acre. Signode was aware of the difficulty previously encountered by the plaintiffs and the Stanley Steel Strapping Company in attempting to obtain permission for a crossing of the railroad tracks along the north boundary of the subdivision, but thought that the great volume of transportation business which Signode expected to generate would induce the Southern Pacific Company to grant permission for a railroad crossing which would provide direct access from California Boulevard to the 20-acre block. However, when the Southern Pacific Company was approached for permission to establish and maintain a crossing of the railroad tracks in order to provide direct access to the 20-acre block from California Boulevard, the Southern Pacific Company refused to grant such permission. Signode then withdrew its offer for the purchase of the 20-acre block from the plaintiffs.

(b) Subsequently, the Signode Steel Strapping Company purchased other land in the Pittsburg area for the construction of its new facility.

31. In 1966, the Triangle Conduit & Cable Company entered into an agreement with the plaintiffs for the purchase of a 6-acre lot within the industrial subdivision mentioned in finding 22, at a price of $65,000. However, after Triangle learned at a conference with the Southern Pacific Company that the latter would not grant permission for a crossing of the railroad tracks along the north boundary of the property in order to provide direct access from California Boulevard to the 6-acre parcel, the agreement between Triangle and the plaintiffs was cancelled by Triangle.

32. On January 21, 1966, the plaintiffs timely filed the present action in this court.

33.(a) Two 20-foot railroad easements for the two sets of existing railroad tracks on parcels M-1 and M-2 would have covered a total of 2.95 acres.

(b) The 79-foot railroad easement on parcels M-1 and M-2 which the defendant reserved in the deed dated June 22, 1962 for the two sets of existing railroad tracks, together with the area between the two sets of tracks, covered a total of 5.55 acres.

34.(a) On the basis of the plaintiffs' plan for the industrial development of the triangular area which parcels M-1 and M-2 comprise (see finding 22), the plaintiffs would have had 46.35 acres of usable and salable land lying south of the two sets of railroad tracks running along the north boundary of the property.

(b) The proper development of the 46.35 acres in accordance with the plaintiffs' basic plan, and the sale of such acreage, would have cost the plaintiffs a total of approximately $156,635, as follows:

| | |
|---|---|
| Engineering and Map Filing | $ 4,000 |
| Railroad Crossings | 99,000 |
| Interest on Investment [2] | 29,160 |
| Selling Costs | 24,475 |
| Total | $156,635 |

[2] Computed at the rate of 6 percent per year for 2 years on the purchase price of $140,000 and development costs totaling $103,000.

(c) The figure of $99,000 in paragraph (b) of this finding includes the estimated cost of properly constructing five grade crossings at the places contemplated in the plaintiffs' plan of industrial development and providing adequate warning devices for the protection of persons and vehicles using the crossings in connection with the transaction of business with the owners of the industrial lots. However, see finding 35.

(d) The usable and salable acreage within the industrial subdivision, if properly developed in accordance with the plaintiffs' plan, could have been sold as of September 1962 at an average price of about $10,000 per acre. Thus, the 46.35 usable acres could have been sold for a total price of about $463,500. This amount, less the costs of purchasing, developing, and selling the acreage (i.e., $140,000 plus $156,635, or a total of $296,635), would have represented a profit of $166,865 to the plaintiffs.

35. If the defendant, in deeding parcels M-1 and M-2 to the plaintiffs, had reserved two 20-foot railroad easements for the two sets of existing railroad tracks on these parcels, in accordance with the contract of purchase and sale between the plaintiffs and the defendant, there would have been no basis for a plan by the Southern Pacific Company to build additional tracks on parcels M-1 and M-2 and to use the trackage on these parcels for a yard in which to hold or store railroad cars. On the other hand, the plaintiffs have not proved by a preponderance of the evidence that it would have been feasible in such a situation to establish and maintain five crossings of the existing sets of railroad tracks on parcels M-1 and M-2 at the places contemplated in the plaintiffs' plan for the industrial development of the area (see finding 22), without interfering unduly with the expected use of the existing sets of railroad tracks for active railroad operations.

36.(a) If the M-1 and M-2 industrial subdivision had been developed by the plaintiffs on the basis of two railroad crossings, one at the western extremity of parcel M-1 and

the other at the eastern extremity of parcel M-2, and the construction of an access road similar to that suggested by the Southern Pacific Company (see finding 27), the plaintiffs would have had 37.76 acres of usable and salable land, since the two sets of railroad tracks and the area between the two sets of tracks covered a total of 5.55 acres and the access road would have covered or made unusable a total of 8.59 acres.

(b) The 37.76 usable and salable acres within the industrial subdivision, if properly developed, could have been sold as of September 1962 at an average price of about $10,000 per acre. Thus, the total usable acreage could have been sold for a total price of about $377,600.

(c) The proper development of the industrial subdivision on the basis of the two railroad crossings and the access road, and the sale of such acreage, would have cost the plaintiffs a total of approximately $244,932.96, as follows:

| | |
|---|---|
| Engineering and Map Filing | $ 4,000.00 |
| Railroad Crossings | 39,600.00 |
| Access Road | 143,233.00 |
| Interest on Investment | 39,219.96 |
| Selling Cost | 18,880.00 |
| Total | $244,932.96 |

(d) Thus, parcels M-1 and M-2, subject to the 79-foot-railroad easement covering the existing trackage and the area between the two sets of tracks, had a fair market value of approximately $132,667.04 as of September 1962.

## Recommended Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are entitled to recover, and it is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of seven thousand three hundred dollars ($7,300).

## APPENDIX B

## IN THE UNITED STATES COURT OF CLAIMS

No. 32-66

(Decided May 16, 1969)

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JOSEPH A. WHITE, JR., ET AL. v. THE UNITED STATES

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*Alfred A. Affinito*, attorney of record for plaintiffs.

*Howard O. Sigmond*, with whom was *Acting Assistant Attorney General Glen E. Taylor*, for defendant.

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Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELETON, and NICHOLS, *Judges*.

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OPINION

NICHOLS, *Judge*, delivered the opinion of the court: *

This case involves an alleged breach by the defendant of a contract in which the defendant agreed to sell certain surplus realty to the plaintiffs.

It is our opinion that the plaintiffs are entitled to recover, since the evidence in the record clearly shows that the defendant breached the contract between the parties. The court has a difficult problem, however, in connection with the determination of the amount due the plaintiffs because of the defendant's wrongful action.

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* We are indebted to Trial Commissioner Mastin G. White for his memorandum opinion and findings of fact. We agree with the former and adopt the latter with minor revisions. We consider that preparation of an opinion of normal scope is necessary to explain fully the reasons for our decision and to prevent future misapplication of it as a precedent. We have borrowed extensively from the commissioner's memorandum opinion.

The realty involved in the present case consists of two parcels of land which formerly were part of the Camp Stoneman Military Reservation in Pittsburg, California. Camp Stoneman was declared surplus to the needs of the United States sometime prior to 1960, and procedures to provide for the disposal of the surplus property were initiated by the defendant's General Services Administration (GSA). Under the disposal plan prepared by the GSA, certain lands within the main cantonment portion of Camp Stoneman were set aside for conveyance to local governmental bodies as sites for schools, parks, and arterial streets; and the remainder of the Camp Stoneman area was divided into parcels for the purpose of sale. The municipal zoning contemplated that parts of the area would be used for heavy industry, controlled manufacture, and business. Part would be residential.

Two of the Camp Stoneman surplus parcels were designated as M-1 and M-2. They are contiguous and together form an area that resembles a modified right-angle triangle, with a south side extending approximately 3,200 feet from west to east, an east side extending approximately 1,200 feet from south to north, and a hypotenuse which extends approximately 3,000 feet from northeast to southwest but fails to meet the south side of the "triangle," so that there is actually a small, curved west side of the area. The area is bounded on the south side by a limited-access freeway maintained by the State of California, on the east side by private property, and on the north side (*i.e.*, the hypotenuse) by a public street that is known as California Boulevard. See the plans attached to this opinion and made a part thereof.

Parcel M-1 contains 11 acres and is located in the western portion of the triangular area previously mentioned. Parcel M-2 contains 40.9 acres and occupies the eastern portion of the triangular area.

Parcels M-1 and M-2 are located outside the main cantonment portion of Camp Stoneman, and they are separated

from the main cantonment portion by the limited-access freeway previously mentioned. The freeway bounds parcels M-1 and M-2 on the south and bounds the main cantonment on the north. Parcels M-1 and M-2 do not have access to the freeway.

Parcels M-1 and M-2 are zoned for heavy industry by the City of Pittsburg. They are the only parcels with such a zoning among the many parcels into which Camp Stoneman was divided.

Two sets of railroad tracks are located on parcels M-1 and M-2. They connect with the main line of the Southern Pacific, north of the parcels. The tracks run along most of the north boundary of the two parcels and are near California Boulevard. The tracks are located approximately 40 feet apart at the western end of parcel M-1, and they run parallel to a point near the eastern boundary of parcel M-2, where they converge into one track. The two sets of tracks and the area between them cover a strip of land approximately 79 feet wide on the north side of parcels M-1 and M-2. The tracks were used by the Southern Pacific Company to provide transportation services for Camp Stoneman when it was an active military installation, and they connect with various spurs and sidings spreading out in the cantonment area south of the freeway, which they cross by a bridge.

At the time when parcels M-1 and M-2 were offered for sale by the GSA, no crossing of the railroad tracks on the parcels had been established, and the tracks effectively separated the remainder of the two parcels from California Boulevard.

A contract was entered into between the defendant (represented by the GSA) and the plaintiffs on June 8, 1962, under which the defendant agreed to sell and the plaintiffs agreed to buy parcels M-1 and M-2 for a price of $140,000. A third parcel, designated as M-4, was also included in the contract. Parcel M-4 is a relatively small and irregularly

shaped parcel lying to the east of the northeast corner of parcel M-2. The parties have treated parcel M-4 as being without significance in connection with the present litigation. With respect to the two sets of railroad tracks on parcels M-1 and M-2, the contract provided in pertinent part as follows:

> *Railroad Easement:* There is reserved and excepted from this sale the existing trackage identified as "A", "I" * * * on the plat attached to the Bid Invitation together with easements therefore [sic] 20 feet wide for railroad and transportation purposes upon, along, over and across parcels M-1, M-2 * * *.

It will be noted that the defendant contracted on June 8, 1962 to sell parcels M-1 and M-2 to the plaintiffs subject to two 20-foot railroad easements for the two sets of existing railroad tracks on the parcels. However, three months earlier, on March 8, 1962, the defendant had entered into a contract with the Southern Pacific Company whereby the defendant agreed to sell and the SP agreed to buy the existing trackage on parcels M-1 and M-2, together with a railroad easement 79 feet wide covering the two sets of tracks and also the area between the two sets of tracks. Thus, the "Railroad Easement" provisions of the contract between the defendant and the plaintiffs, on the one hand, and the contract between the defendant and the Southern Pacific Company, on the other hand, were inconsistent in so far as parcels M-1 and M-2 were concerned. The evidence in the record warrants the inference that this mix-up was due to faulty coordination among the personnel of the GSA, rather than to intentional wrongdoing by anyone. The defendant was faced with the necessity of breaching one of the contracts, and elected to breach the contract with the plaintiffs. The railroad contract was the earlier and defendant claims that the conflict between it and the plaintiffs was an inadvertence the plaintiffs should have discovered. We do not agree with this. *Pikesville Home Builders Inc.* v. *United States*, 160 Ct. Cl. 541 (1963).

A quitclaim deed conveying parcels M-1 and M-2 to the plaintiffs was prepared by the GSA on June 22, 1962. The quitclaim deed stated with respect to parcels M-1 and M-2 that there was reserved to the defendant, its successors and assigns, an easement for railroad and transportation purposes over a strip of land 79 feet wide running along the north side of the parcels and containing the two sets of existing railroad tracks, together with the area between the two sets of tracks.

The quitclaim deed mentioned in the preceding paragraph was delivered by the GSA to the plaintiffs' escrow agent, Western Title Guaranty Company, on August 8, 1962, with closing instructions. The title transaction was closed and the purchase price was paid to the GSA on September 2, 1962. The deed was recorded by the Western Title Guaranty Company on September 21, 1962. It was forwarded to the plaintiffs by the escrow agent approximately one month later.

Prior to the receipt of the quitclaim deed from their escrow agent, the plaintiffs themselves did not see the deed or receive any actual notice regarding the variance between the description in the deed of the railroad easement on parcels M-1 and M-2, on the one hand, and the "Railroad Easement" provision contained in the contract between the plaintiffs and the defendant, on the other hand.

As a result of the defendant's breach of contract, the narrow strip of land between the two sets of railroad tracks on parcels M-1 and M-2, comprising a total area of 2.6 acres, was conveyed to the plaintiffs subject to a railroad easement, whereas the defendant had agreed in the contract between the parties to convey this narrow strip of land to the plaintiffs free of any railroad easement. Neither side introduced any evidence at the trial with respect to the difference as of September 1962 between the fair market value of the 2.6 acres subject to the railroad easement and the fair market value that the 2.6 acres would have had free

of any railroad easement. The lack of such evidence is not surprising, however, since the narrow strip of land between the two sets of railroad tracks probably did not constitute salable acreage as of September 1962, separate and apart from other portions of parcels M-1 and M-2.

It has been said that, owing to the good faith blunders of its agents, defendant was in a position where its contracts with the plaintiffs and with the Southern Pacific Railroad were inconsistent and it had to breach one or the other. It elected to breach the contract with plaintiffs. It has not yet performed the contract with the Railroad owing to a title difficulty involving other land. It appears, however, that the Railroad is the equitable owner of a 79 foot easement over the plaintiffs' land and doubtless it has a right to receive a deed confirming its title on demand. The Railroad asked to be sold the 79 foot easement to fulfill a plan it had to construct two additional tracks along the strip between the two that were already there, making four in all. Defendant has treated the Railroad as owner of its easement in dealings with plaintiffs, as in referring them to the Railroad to discuss crossings over the tracks, and this seems proper. As to plaintiffs, the breach is irrevocable and the only serious issue is the measure of damages.

The plaintiffs attempted to show that the GSA representative, Mr. Prendergast, promised the plaintiff, Joseph A. White, Jr., before the award, that the plaintiffs would have access to parcels M-1 and M-2 from any point along California Boulevard. Our Finding is (Finding 16-d) that the representative did state that the purchaser of the parcels would have access to California Boulevard and that there would be no problem in obtaining access. The plaintiffs have not taken exception to this Finding. We do not read it as meaning that Mr. Prendergast said the access would be anywhere along California Boulevard or at an unlimited number of points. The evidence does not indicate that the plaintiffs have been denied anything Mr. Prendergast is found to have promised. Accordingly, it is unnecessary to

consider whether an oral promise by him could possibly bind the defendant.

This underbrush eliminated, there stands clearly before us the great controverted fact issue in the case. Plaintiffs were promised a fee title subject to an easement for 2 tracks. The defendant gave them such a title subject to an easement for 4 tracks. The fact question that remains is what difference, if any, exists between the fair market value of the property subject to these two different easements. In light of the amount of the plaintiff's claim the award recommended by our commissioner, which we confirm, $7,300, reflects a finding that the difference in the two values is relatively slight because the difference in the burdens on the servient tenement as between the two easements is likewise slight. The plaintiffs say the differences are great, but we do not agree.

The 2 existing tracks running over plaintiffs' land to the area South of the freeway constitute what the Southern Pacific Railroad calls a "drill track." One plan in evidence calls one a "drill track," the other a "storage track." On the other side of the freeway the lines branch out as stated above into various spurs which served Camp Stoneman when it was a military cantonment, and are intended in the future to serve the manufacturing and other business the GSA has located, and expects in future to locate, in the area, under the City's zoning. A drill track is in general a sort of main road to provide rail service from the main line to an area where customers of the railroad are located. At the time of trial, only 3 industries were actually operational across the freeway, so the use of the drill track did not reach its potential. The track on plaintiffs' premises was also largely used for car storage.

The Railroad had no immediate plans for utilizing the easement for 2 additional tracks it had contracted to purchase from the Government. This would be done when the need arose. Meanwhile, it is clear that the use of the 2

tracks was, volume aside, substantially the same as the use of the 4 tracks would be when the additional 2 were put in place.

The plaintiffs intended, and we have found, that they would divide parcels M-1 and M-2 into lots of approximately 5 acres each, except for 1 which was larger but less usable. All 10 would extend from north to south with frontage both on California Boulevard and on the freeway. They would be sold for industrial uses. Plaintiffs said they intended to provide each pair of lots with an access road running across the tracks and then along the boundary between the two members of the pair. They meant that these crossings would be "private," that is, not dedicated as streets to public use, and therefore that no expensive safety devices such as automatic lights and gates would or could be required. There would thus be 5 crossings, all without safety devices and at approximately even distances. Plaintiffs seemed to think that there was nothing about this that was incompatible with the Railroad's use. Plaintiffs except to our Finding 16-e, which is to the contrary. Plaintiffs stated at times a lower aggregate number of crossings was all they required, but the record does not show just where they would be.

We will note at the outset that according to uncontradicted testimony the private crossings of the kind contemplated are normally revocable by the Railroad at will on 30 days notice. Plaintiffs hardly could have expected that 10 major industrial firms would make large investments in plant facilities with no access to them provided not revocable on 30 days notice. The Railroad recognized that any crossing rights it granted could not be revocable. Presumably, however, an attempt by the Railroad to revoke a private crossing right it had previously approved would be a matter for the Commission under the statute to be quoted below.

Plaintiffs believe that under the California Public Utilities Code, Section 7537, they would somehow have had a

legal right to these 5 or 4 or 3 private crossings, in case of a 2 track easement, but somehow lose that right by reason of the creation of a 4 track easement. The Statute in question reads as follows (West's Ann. Pub. Util. Code § 7537):

> FARM AND PRIVATE CROSSINGS; CONSTRUCTION AND MAINTENANCE; AUTHORITY OF COMMISSION. The owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right of way as are reasonably necessary or convenient for ingress to or egress from such lands, or in order to connect such lands with other adjacent lands of the owner. The owner or operator of the railroad shall construct and at all times maintain such farm or private crossing in a good, safe, and passable condition. The commission shall have the authority to determine the necessity for any crossing and the place, manner, and conditions under which the crossing shall be constructed and maintained, and shall fix and assess the cost and expense thereof. (Stats. 1951, c. 764, p. 2181, § 7537.)

Without inquiring into plaintiffs' legal proposition in detail, it suffices to point out the following:

a. The statute does not distinguish between 2 and 4 track lines.

b. By its own terms the crossing right is limited to what is reasonable necessary and convenient. The California decisions indicate that unreasonable demands cannot be made on railroads under this section. The rights of a private crossing owner are always subordinate to the reasonable operating necessities of the railroad. *Matoza* v. *Southern Pacific Co.*, 59 Cal. App. 636, 211 Pac. 252 (1922).

c. Contrary to plaintiffs' belief, according to the record, a crossing being private does not of itself eliminate the necessity for safety devices. This depends on the character of the traffic, both rail and highway. There is evidence that the Railroad, with commission support expected, would have considered installation of safety devices necessary on any cross-

ings over its tracks to plaintiffs' land, whether such crossings were private or public.

d. Apparently a private crossing can be established by agreement without action of the commission, and the role of the commission is somewhat that of an umpire. In case of a disagreement, before the commission, the views of the railroad as to its operating needs would be of great importance. Defendant's witness Lippow testified that railroads have "tremendous rights" in this area and are "pretty powerful", meaning, we suppose, that they are not easily forced, through these statutory proceedings or otherwise, to open up crossings, private or otherwise, if incompatible with their operating needs.

e. There were various estimates of the cost of private crossings with safety devices. Our commissioner, in Finding 34-c, determined that the cost of 5 crossings with safety devices would have been $99,000, a figure not taken into account by plaintiffs.

f. The Railroad refused to agree to even a single private crossings, where plaintiffs want it, and the plaintiffs did not invoke the statutory procedure by appealing to the commission, their reason apparently being that they thought they had to reduce the easement to 2 tracks before an appeal would have a chance, and for the further reason that the Railroad did not yet own the tracks. What the commission would have done is, therefore, naturally in the realm of speculation, at least so far as concerns the record in this case. There is no adequate showing as to why the extra 2 tracks made all that much difference in plaintiffs' statutory rights.

g. Mr. Dado, the only representative of the Southern Pacific to testify, said that the Railroad's Operating Department had decided "regardless of whether the other 2 tracks go in it is not feasible to put a private crossing there over those 2 tracks." The reason was the complexity of switching cars into the area for storage, if the private crossings had to be left unobstructed, and the prolonged blocking of the crossings that would probably occur. Moreover, there would be "a very dangerous crossing condition for

> use of a crossing" the reason being that "it is blinded by the parking of cars adjacent * * * Railroad cars." The cars parked for storage would make it difficult for a person coming from parcels M-1 and M-2 "to see what was coming down the track." Our commissioner's conclusion in Finding 16-e that the plaintiffs expectation was unreasonable with respect to the 2 track operation and incompatible with that operation appears to us to be supported by substantial evidence. It is indeed difficult to believe that responsible industrial concerns would be willing to require their employees to travel to and from work over such dangerous crossings.

Plaintiffs, however, insisted and still insist that except for the 2 extra tracks planned for, and provided for in the easement, there would have been no problem about obtaining the private crossings they needed. The basis for this belief is that the representatives of the Railroad, when refusing the first of the proposed crossings, the one requested for Stanley Steel Strapping Co. (Finding 23-e), reportedly stated that the reason for refusing the crossing was that it would interfere with the plans to construct 2 additional sets of tracks and to use the area of the easement as a storage yard. This was, however, as to the 2 track easement, a negative inference of a somewhat tenuous kind, which would have been dissipated by an inquiry of Mr. Dado, if he was telling the truth at the trial. The 4 track easement was the legal reality so far as the Railroad was concerned and any talk about the 2 track easement would have been a subjunctive contrary to fact. It is, therefore, natural that they framed their statements in terms of the 4 track situation. It may be that someone was not being overzealous for the plaintiffs' enlightenment inasmuch as plaintiffs were trying in court to limit the easement to 2 tracks, through the Court of Appeals, (*White* v. *Administrator of GSA*, 343 F. 2d 444 (9th Cir. 1965)), apparently without anyone ever bothering to tell them that such refor-

mation of the deed would be futile for their purposes. However, this was before our commissioner and he still elected to believe that the proposed private crossings would have been unacceptable with a 2 track easement. His determination is not so plainly erroneous as to be subject to overturning under Rule 66. Mr. Dado was before the trial commissioner who had every opportunity to evaluate his credibility and evidently rated it high. Simply from the common sense of the thing it would appear that for a given volume of Railroad business on the tracks, the 2 track set-up might often have been more dangerous than the 4 track set-up.

Plaintiffs compute that the profits they would have derived from these speculations in real estate will be practically wiped out by the costly arrangement which is the only one the Railroad will agree to for access to industrial plants on parcels M-1 and M-2. This is to have crossings, with the proposed safety devices, near the 2 east and west extremities of plaintiffs' land, whether public or private crossings, the Railroad does not care. From these 2 crossings and connecting them to the proposed industrial plants, plaintiffs would have to construct a road along the boundaries to the west, south and east. The court has prepared from the exhibits and testimony plans which will illustrate the differences between plaintiffs' and the Railroad's development projects. Regretable as it is, we cannot see any proof in the record that plaintiffs could have achieved access in any cheaper manner in the event they had received title burdened only with the 2 track easement according to their contract. They did not offer any evidence of the probable cost of any development scheme that met the Railroad views part way, nor was there any evidence that any compromise between their wish and the Railroad's was a practical possibility. It follows that the only thing the plaintiffs have proved they lost by the breach of contract is the narrow strip between the existing tracks which will be occupied by the new tracks if they are built as planned, the record being silent as to any use the plaintiffs could have

put this strip to. Tested by this standard the proposed award of $7,300 does not seem unreasonably small.

The normal measure of damages for partial breach of a contract to convey real estate is the difference between the value of what was conveyed and what should have been. *Reynolds* v. *United States*, 141 Ct. Cl. 211, 158 F. Supp. 719 (1958). Since the parties have discussed *Pikesville Home Builders* v. *United States, supra,* we close by stating we have considered this case and it is not in point, except on the proposition for which it is cited above. Plaintiff there, bid on an offer of surplus Government land represented to front on a named thoroughfare. Unknown to it, the thoroughfare was of the then unfamiliar limited access type and the normal right of access had been deeded away. The General Conditions allowed the buyer to withdraw and recover his deposit if the title was found not marketable. We held it was not marketable for the uses for which plaintiff intended it because of the lack of access. Here the defendant offered the property "as is," "where is," with no guaranty or warranty of marketability whatever. It follows that lack of access was not a breach of itself and plaintiffs' damages are limited to those directly related to the difference between the interest the defendant contracted to convey, and what it did convey.

Accordingly, judgment is entered for the plaintiffs in the sum of $7,300.

## Findings of Fact

1.(a) Prior to 1960, the defendant's Camp Stoneman Military Reservation, which consisted of more than a thousand acres of land and was located within the present city limits of Pittsburg, California, was declared surplus to the needs of the defendant, and procedures to provide for the disposal of the area were initiated.

(b) Sam Staakecker, a realty officer employed by the defendant's General Services Administration (GSA) and

assigned to the Property Management and Disposal Division, Region 9, San Francisco, inspected Camp Stoneman and prepared a disposal plan respecting the surplus property. Until his resignation in 1960, Mr. Staakecker was responsible for carrying out the disposal plan.

(c) The disposal plan mentioned in paragraph (b) of this finding provided for the employment by the defendant of appraisers to assess the value of the surplus property, the preparation of advertisements to notify the public of the proposed sale, the preparation and distribution of bid invitations, the opening of bids, the making of awards, and the preparation of deeds and deeds of trust.

2. In November 1960, Robert M. Prendergast joined the personnel of the San Francisco regional office of the GSA as a realty officer, and succeeded to Sam Staakecker's responsibilities with respect to the disposal of Camp Stoneman.

3.(a) Under the disposal plan referred to in finding 1, certain lands within the main cantonment portion of Camp Stoneman were set aside to be deeded to local governmental bodies as sites for schools, parks, and arterial streets.

(b) The remainder of Camp Stoneman was parcellized for the purpose of sale. Such parcels were zoned by the City of Pittsburg for varying uses, including "Industrial," "Controlled Manufacturing," "Administrative & Professional," "Multi-Family Dwellings & Limited Commercial," "Neighborhood Commercial," "Multi-Family Dwellings & Fraternal Organizations," "Duplex Family Residences," and "Single Family Residences."

4.(a) Two of the parcels referred to in finding 3(b) were designated as M-1 and M-2. Parcels M-1 and M-2 are involved in the present litigation.

(b) Parcels M-1 and M-2 are contiguous and together form an area that resembles a modified right-angle triangle, with a south side extending approximately 3,200 feet from

east to west, an east side extending approximately 1,200 feet from south to north, and a hypotenuse which extends approximately 3,000 feet from northeast to southwest but fails to meet the south side of the "triangle," so that there is actually a small, curved west side of the area. The area is bounded along the south side by a limited-access freeway maintained by the State of California, on the east by private property, and along the hypotenuse (which, for the sake of convenience, will be referred to hereafter in the findings as the "north" side or boundary) by a public street that was formerly known as Antioch Road and is now referred to as California Boulevard.

(c) Parcel M-1, consisting of approximately 11 acres, is located in the western portion of the triangular area mentioned in paragraph (b) of this finding. The southern boundary of parcel M-1 constitutes about one-third of the southern boundary of the triangular area.

(d) Parcel M-2, consisting of approximately 40.9 acres, is a modified trapezoid that occupies the eastern portion of the triangular area mentioned in paragraph (b) of this finding. The southern boundary of parcel M-2 constitutes about two-thirds of the southern boundary of the triangular area.

(e) Parcels M-1 and M-2 are located outside the main cantonment portion of Camp Stoneman, and they are separated from the main cantonment portion by the limited-access freeway previously mentioned, which runs from the eastern end of Contra Costa County to the San Francisco Bay area. Parcels M-1 and M-2 are located north of the freeway, while the main cantonment portion is located south of the freeway. Parcels M-1 and M-2 do not have access to the freeway, which forms the south boundary of the two parcels.

(f) California Boulevard, which forms the north boundary of parcels M-1 and M-2, is a public street that is dedicated to public use and is maintained by the County of

Contra Costa. Parcels M-1 and M-2 together have approximately 3,000 feet of frontage on California Boulevard, which is the only public street that borders on these parcels.

(g) Parcels M-1 and M-2 are zoned "Industrial" by the City of Pittsburg. They are the only parcels among those into which the former Camp Stoneman was divided with such a zoning. Plaintiffs construed it as meaning unrestricted use by heavy industry. Extensive areas across the freeway were zoned "controlled manufacturing."

5.(a) Two sets of railroad tracks, referred to as "drill" tracks, are located on parcels M-1 and M-2. Drill tracks link the main line of the railroad with the spurs and sidings of its industrial customers. These tracks, connecting with the main line of the Southern Pacific north of parcels M-1 and M-2, run along most of the north boundary of the parcels, dividing into two near the eastern boundary of M-2, and rejoining into one near the western end of M-1. There they traverse the freeway by a bridge, dividing into numerous spurs south of the freeway. The two sets of tracks and the area between them cover a strip of land approximately 79 feet wide on the north side of parcels M-1 and M-2.

(b) There is room to install two more sets of tracks between the existing tracks.

(c) The tracks had been used by the Southern Pacific Company to provide transportation services for Camp Stoneman when it was an active military installation. At the time of trial the railroad used the tracks as drill tracks for rail access to manufacturing areas south of the freeway, and extensively for storage of cars.

(d) There is no crossing of the railroad tracks on parcels M-1 and M-2, and the tracks effectively separate the remainder of the parcels from California Boulevard.

(e) The plaintiffs are local real estate agents in Pittsburg, California; and at all times material to this litigation,

they were familiar with the location of the railroad tracks on parcels M-1 and M-2, and with the use that was being made of such tracks.

6.(a) In 1960, after the completion of the appraisals on those parcels within the Camp Stoneman area that were to be sold, the defendant began the process of offering such parcels for sale.

(b) Some of the parcels to be sold were actually offered for sale on three separate occasions. If no acceptable bid, in the light of the appraised value, was received for a particular parcel on the first offering, that parcel was offered for sale at a subsequent time; and if no acceptable bid was received on the second offering, the particular parcel was later offered for sale on a third occasion.

(c) Some of the parcels were sold while Sam Staakecker was in charge of the disposal of the Camp Stoneman properties. However, most of the parcels remained unsold when Robert M. Prendergast succeeded to Mr. Staakecker's responsibilities in November 1960.

(d) Parcels M-1 and M-2 were included among the first offering of parcels within the Camp Stoneman area for sale by the defendant. However, no acceptable offer for M-1 or M-2 was received at that time.

7.(a) Prior to the first offering of parcel M-1 for sale, personnel of the defendant prepared a description of this parcel which referred to it as being subject to "An easement 20 feet in width granted to the Southern Pacific Company and lying equally on either side of two parallel existing railroad tracks located in the most northerly 80 feet of the * * * parcel."

(b) Prior to the first offering of parcel M-2 for sale, personnel of the defendant prepared a description of this parcel which referred to it as being subject to "An easement 20 feet in width granted to the Southern Pacific Company for railroad purposes and lying equally on either side

of two existing railroad tracks located in the most northerly 50 feet of the * * * parcel."

(c) The references in the descriptions of parcels M-1 and M-2, mentioned in paragraphs (a) and (b) of this finding, to railroad easements having been "granted" to the Southern Pacific Company were erroneous, although negotiations were in progress between the defendant and the Southern Pacific Company at the time with respect to the granting to the latter of railroad easements on parcels M-1 and M-2, and also on other parcels within the Camp Stoneman area. (See finding 8.)

(d) The description of the existing railroad tracks on parcel M-2 as being located in the most northerly 50 feet of the parcel (see paragraph (b) of this finding) was erroneous, since the two sets of tracks on parcel M-2, together with the area between them, covered a strip of land approximately 79 feet wide.

8.(a) Beginning as early as 1960, at least, negotiations were undertaken between the defendant and the Southern Pacific Company with respect to the existing railroad tracks, and railroad easements for them, on lands within the Camp Stoneman area, including parcels M-1 and M-2. With regard to the trackage on parcels M-1 and M-2, the defendant desired to sell both of the existing sets of tracks, and a 20-foot easement for each of them, to the Southern Pacific Company in order to assure railroad service to parcels in the main cantonment portion of Camp Stoneman lying west of parcels M-1 and M-2.

(b) During the course of the negotiations referred to in paragraph (a) of this finding, the Southern Pacific Company prepared and furnished to the defendant a plat dated July 27, 1960 (and later revised), depicting (among other things) the two existing sets of tracks on parcels M-1 and M-2, and a proposed railroad easement across parcels M-1 and M-2 for such tracks, the proposed easement being 79

feet wide and covering not only the two existing sets of tracks but also the area between the two sets of tracks.

(c) By means of a letter dated November 14, 1961 and addressed to the GSA regional office in San Francisco, the Southern Pacific Company submitted an offer for the purchase of the two existing sets of tracks, and a railroad easement for them, on parcels M-1 and M-2, together with other trackage and easements on parcels located within the main cantonment area of Camp Stoneman. The railroad easement which the Southern Pacific Company proposed to acquire across parcels M-1 and M-2 was 79 feet wide and covered the two existing sets of tracks, together with the area between the two sets of tracks.

(d) On February 26, 1962, the Southern Pacific Company amended its offer by agreeing "to maintain the existing trackage in its present location for a period of five years from the date of sale to the railroad, unless purchasers of land served by such trackage request relocation or abandonment."

(e) The Southern Pacific Company's offer included two alternative propositions with respect to the payment that would be made for the trackage and easements. Under alternative No. 2, the company offered to make a lump-sum cash payment of $53,518.

(f) Under the date of March 8, 1962, the GSA regional office in San Francisco wrote a letter to the Southern Pacific Company, stating in part as follows:

> General Services Administration hereby accepts your offer presented as Alternative No. 2 in your letter of November 14, 1961, as amended, and supplemented by your letter of February 26, 1962, which includes the purchase of certain trackage and easements at Camp Stoneman, Main Cantonment Area, Pittsburg, California.

9.(a) Pursuant to the agreement made with the Southern Pacific Company (see finding 8), the GSA prepared a docu-

ment entitled "Easement and Bill of Sale," conveying to the Southern Pacific Company the trackage and easements involved in the agreement. Upon receipt of this document, the Southern Pacific Company caused a title search to be made respecting the easements purportedly conveyed in the document. This search revealed that the defendant had neglected to reserve railroad easements in connection with the prior conveyance of certain lands within the main cantonment area of Camp Stoneman, as to which the document entitled "Easement and Bill of Sale" purported to convey railroad easements and trackage to the Southern Pacific Company. Because of this, the Southern Pacific Company refused to accept title under the "Easement and Bill of Sale," or to make any payment to the defendant, until the title defects were corrected.

(b) Efforts by the defendant to obtain railroad easements on the parcels within the main cantonment area which the defendant had conveyed without reserving such easements have been unsuccessful.

(c) The document entitled "Easement and Bill of Sale" has never been recorded.

(d) Notwithstanding the failure of the defendant and the Southern Pacific Company to consummate the agreement, the Southern Pacific Company has continued to use the two sets of railroad tracks running along the north side of parcels M-1 and M-2 in order to provide transportation services for the owners of lands situated west of parcels M-1 and M-2, in what was formerly the main cantonment portion of Camp Stoneman. The present railroad traffic into the Camp Stoneman area amounts to approximately 7 or 8 cars a month, which is minimal in relation to the potential of the area.

(e) The tracks on parcels M-1 and M-2 have also been used by the Southern Pacific Company during recent years for the storage of freight cars.

10.(a) Sometime in the spring of 1962, the defendant again invited bids for the purchase of parcels M-1 and M-2,[1] as well as 46 other parcels within the Camp Stoneman area. This offering included a total of approximately 555.7 acres.

(b) The invitation for bids contained, *inter alia*, a paragraph stating in part as follows:

> *Railroad Easement:* There is reserved and excepted from this sale the existing trackage identified as "A", "I" * * * on the plat attached to the Bid Invitation together with easements therefor [sic] 20 feet wide for railroad and transportation purposes upon, along, over and across parcels M-1, M-2 * * *.

(c) The railroad tracks designated as "A" and "I" in the "Railroad Easement" paragraph of the invitation for bids, partially quoted in paragraph (b) of this finding, were the same two sets of tracks previously mentioned in finding 5 as being located on, and as running along the north side of, parcels M-1 and M-2, near California Boulevard, and mentioned in finding 8 as being involved in a contract of sale between the defendant and the Southern Pacific Company. Track "A" was the track nearest to California Boulevard.

(d) The invitation for bids contained "Instructions to Bidders," stating in part as follows:

> 2. All bids submitted shall be deemed to have been made with full knowledge of all terms, conditions, and requirements herein contained.
>
> 3. *Inspection of property.* The premises are now subject to inspection by prospective bidders. * * * The failure of any bidder to inspect or to be fully informed as to the condition of all or any portion of the premises or property offered, will not constitute grounds for any claim or demand for adjustment or withdrawal of a bid after opening.

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[1] The record before the court is not clear as to whether this was the second or the third offering of parcels M-1 and M-2 for sale.

(e) The invitation contained "General Terms and Conditions," stating in part as follows:

> 2. *Sold "AS IS" and "WHERE IS."* The descriptions and locations of the premises, facilities, and property named in the foregoing Invitation are believed to be sufficiently specific for purposes of identification. Any error or omission in such description shall not constitute any ground or reason for nonperformance of the contract or claim by the successful bidder for any allowance, refund, or deduction from the amounts offered. A complete description of the property with all exceptions, reservations, and restrictions is available at the General Services Administration office where this bid is to be submitted and all bids submitted will be on the basis of such complete description. The Government does not make any guaranty or warranty, express or implied, as to the quantity, quality, character or condition, size or kind, thereof; or that same are in condition or fit to be used for the purpose for which intended.
>
> * * * * * *
>
> 3. *Agreement of Sale.* The foregoing Invitation, with all the instructions, terms and conditions set forth herein, and the Bid, when accepted by the Government shall constitute an agreement of sale between the successful bidder and the Government. Such agreement together with terms contained in the security instruments shall constitute the whole contract, to be succeeded only by the formal instruments of transfer * * *.
>
> * * * * * *
>
> 13. *Conveyance of the Property.* If a bid for the purchase of the real property is accepted, conveyance of the Government's interest therein will be made by Quitclaim Deed being without warranty, express or implied.

(f) The invitation for bids stated that sealed bids would be received at the GSA Business Service Center in San Francisco or the GSA Business Service Center in Los Angeles until 11 a.m. on May 3, 1962, at which time they would be publicly opened and read.

(g) The invitation for bids also stated that GSA "reserves the right to reject any or all proposals."

11. Robert M. Prendergast (see finding 2) was responsible for the preparation and issuance of the invitation for bids referred to in finding 10.

12.(a) The plaintiff Joseph A. White, Jr., is a real estate broker and investor, operating under the name of Los Medanos Realty Company. He began his realty career as a salesman in 1949, and he received his broker's license in the early 1950's. His office has generally been located in the Pittsburg area of Contra Costa County, California. As broker for Los Medanos Realty Company, he has handled many real estate transactions, and has become familiar with local property, in the Pittsburg area.

(b) In 1962, the plaintiff Anthony J. DeMetro was a licensed real estate salesman employed by Los Medanos Realty Company.

(c) In 1962, the plaintiff Anthony Enea was in the employ of Los Medanos Realty Company, functioning as an associate broker.

(d) In 1962, the plaintiffs Joseph A. White, Jr., Anthony DeMetro, Anthony Enea, and Frank A. Siino, a business associate of Joseph A. White, Jr., formed a syndicate for the purpose of bidding on parcels M-1 and M-2 in the Camp Stoneman area.

13.(a) Prior to the May 3, 1962 deadline for the submission of bids in response to the invitation mentioned in finding 10, the plaintiff Anthony J. DeMetro visited the GSA project office at Camp Stoneman and obtained copies of the description of parcels M-1 and M-2 that had been prepared in connection with the first offering of these parcels for sale (see finding 7). The evidence indicates that the furnishing to Mr. DeMetro of descriptions prepared in connection with a prior offering of the parcels for sale was inadvertent on the part of the GSA project office personnel.

The plaintiffs did not obtain from the GSA Business Service Center in San Francisco or the GSA Business Service Center in Los Angeles copies of the descriptions of parcels M-1 and M-2 that had been prepared in connection with the then-current offering of these parcels for sale.

(b) Mr. DeMetro also obtained information concerning the procedure for the submission of sealed bids in response to the invitation referred to in finding 10.

(c) Mr. DeMetro asked how the purchaser of parcels M-1 and M-2 would gain access to a public street or highway, and was informed that the purchaser of the parcels would have access to California Boulevard.

14.(a) The plaintiffs arranged to have the Western Title Guaranty Company make a title report respecting parcels M-1 and M-2. The title company submitted to the plaintiffs a preliminary title report dated April 6, 1962.

(b) With respect to parcel M-1, the preliminary title report indicated that the title company had notice, from correspondence in its files, regarding an unrecorded railroad easement 20 feet in width granted to the Southern Pacific Company and lying equally on either side of two parallel railroad tracks located in the most northerly 80 feet of parcel M-1.

(c) With respect to parcel M-2, the preliminary title report indicated that the title company had notice of an unrecorded 20-foot easement granted to the Southern Pacific Company for railroad purposes and lying equally on either side of two existing railroad tracks in the most northerly 50 feet of parcel M-2.

15.(a) On May 3, 1962, the plaintiffs submitted to the GSA Business Service Center in San Francisco a bid in the amount of $86,979 on three of the parcels included in the invitation for bids referred to in finding 10. The three parcels on which the plaintiffs submitted a bid were designated as M-1 and M-2, mentioned in previous findings, and

M-4, a relatively small and irregularly shaped parcel lying to the east of the northeast corner of parcel M-2. Parcel M-4 is not involved in the present litigation.

(b) Sometime between May 3 and 17, 1962, the GSA sent a telegram to the plaintiffs, stating (among other things) that "All bids are still under consideration"; that "Prior to making decision on any bid, high bidders are being afforded opportunity to increase their bids"; and that "If you wish to increase your lump sum bid on parcels M-1, M-2, M-4, such increased bid should be in letter addressed to this office postmarked not later than May 17 * * *."

16.(a) After receiving from the GSA the telegram referred to in finding 15(b), the plaintiffs Joseph A. White, Jr., and Anthony J. DeMetro went to see Robert M. Prendergast and had a conference with him. Mr. White acted as the principal spokesman for the plaintiffs at the conference.

(b) Mr. White inquired of Mr. Prendergast regarding the amount by which it would be necessary for the plaintiffs to increase their bid in order to make the bid acceptable. Mr. Prendergast replied that he could not state any figure, and that the plaintiffs would have to use their own best judgment regarding the amount of the increase in the bid.

(c) Mr. White also asked whether the defendant's appraisal report concerning parcel M-2 had given any value to a couple of incinerators that were located on parcel M-2. Mr. Prendergast was unable to answer this question at the moment, and told Mr. White that the desired information would be obtained. Later, Mr. Prendergast checked the appraisal report and then told Mr. White that such appraisal had given a value for the incinerators.

(d) In addition, Mr. White raised a question with Mr. Prendergast as to how the purchaser of parcels M-1 and M-2 would gain access to and from such parcels, in view of the circumstance that they were bounded on the south by a limited-access freeway and on the east by private land, and

the two existing sets of railroad tracks that ran along the north side of parcels M-1 and M-2 effectively separated the remainder of the two parcels from California Boulevard. Mr. Prendergast stated, in effect, that the purchaser of parcels M-1 and M-2 would not have any access to the freeway; that the purchaser of these parcels would have access to California Boulevard; and that there would be no problem in obtaining access to California Boulevard from parcels M-1 and M-2.

(e) Messrs. White and DeMetro testified at the trial that they understood from Mr. Prendergast's comments, as summarized in paragraph (d) of this finding, that the purchaser of parcels M-1 and M-2 could have as many crossings of the railroad tracks as might be desired; that such crossings could be placed wherever the purchaser might desire them; and that the purchaser would have complete discretion to determine the nature of the warning devices that would be installed at the crossings for the protection of persons and vehicles using the crossings. Such an understanding was unreasonable, since the invitation for bids expressly stated that the two existing sets of railroad tracks on parcels M-1 and M-2, together with 20-foot easements for railroad and transportation purposes, were reserved from the offering. This clearly implied that active railroad operations would continue on the existing railroad tracks. Crossings of the tracks without limitation or restriction as to number, location, or warning devices would have been incompatible with continued active railroad operations on the tracks. There is no substantial evidence that plaintiffs, if servient to a two-track easement only, could have arranged for necessary crossing rights, and access to industrial plants on parcels M-1 and M-2, in any manner less burdensome to plaintiffs than the manner described in Findings 25 and 27.

17.(a) After the conference mentioned in finding 16, and in response to the telegram referred to in finding 15(b), Joseph A. White, Jr., acting for himself and the other plain-

tiffs, sent a letter to the GSA on May 17, 1962, stating in part as follows:

> I desire to increase the amount of my bid [on parcels M-1, M-2, and M-4] from $86,979.00 to $140,000.00, which offer is made on the same terms as the original bid.

(b) On June 8, 1962, the GSA sent a letter to the plaintiffs, stating in part as follows:

> The General Services Administration hereby accepts your increased Bid * * * in the amount of $140,000.00 for Parcels M-1, M-2, and M-4, Camp Stoneman.

18. At the time when the plaintiffs purchased parcels M-1 and M-2, these parcels (as well as the other portions of the Camp Stoneman area) were located within the city limits of Pittsburg, California. In a letter dated June 19, 1962, the City Manager of Pittsburg advised the plaintiffs that access to parcels M-1 and M-2 was to be from California Boulevard.

19.(a) A quitclaim deed conveying parcels M-1, M-2, and M-4 to the plaintiffs was prepared by the GSA on June 22, 1962 and was delivered to the plaintiffs' escrow agent, Western Title Guaranty Company, on August 8, 1962, with closing instructions.

(b) The title transaction was closed and the purchase price was paid to the GSA on September 2, 1962. The quitclaim deed was recorded by the Western Title Guaranty Company on September 21, 1962, and was forwarded to the plaintiffs by the escrow agent approximately one month thereafter.

(c) The quitclaim deed stated with respect to parcels M-1 and M-2 that there was reserved to the defendant, its successors and assigns, an easement for railroad and transportation purposes over a strip of land 79 feet wide running along the north side of parcels M-1 and M-2 and contain-

ing the two sets of existing railroad tracks, together with the area between the two sets of tracks.

20. Prior to the receipt from their escrow agent of the quitclaim deed mentioned in finding 19, the plaintiffs themselves did not see the deed or receive any actual notice regarding the variance between the description in the deed of the railroad easement on parcels M-1 and M-2 (see finding 19(c)), on the one hand, and the "Railroad Easement" provision contained in the contract between the plaintiffs and the defendant (see finding 10(b)), on the other hand.

21. According to the quitclaim deed referred to in finding 19, the plaintiffs Joseph A. White, Jr. (and Lois M. White, his wife), Anthony J. DeMetro (and Betty J. DeMetro, his wife), Anthony Enea (and Rose Enea, his wife), and Frank A. Siino (and Mary V. Siino, his wife) each owns an undivided one-quarter interest in parcels M-1 and M-2.

22.(a) As indicated in finding 4(g), parcels M-1 and M-2 are zoned "Industrial" by the City of Pittsburg, California. The plaintiffs acquired these parcels with the intention of dividing the triangular area which they comprise into industrial lots for the purpose of resale. Accordingly, after acquiring parcels M-1 and M-2, the plaintiffs engaged a firm of consulting civil engineers and had them prepare in September 1962 a plat dividing the triangular area into 10 lots. These lots—which were each about 5 acres, except for one larger—were created by drawing lines from the north boundary of the triangular area (along California Boulevard) to the south boundary of the area (along the freeway).

(b) The plan of subdivision referred to in paragraph (a) of this finding contemplated that five crossings of the railroad tracks running along the north boundary of the triangular area would be established by the plaintiffs, each crossing being located at a place which would enable it to serve—and provide direct access from California Boulevard to—two contiguous lots.

23.(a) Shortly after the plaintiffs acquired parcels M-1 and M-2, Johnson S. Bogart, of the firm of Coldwell, Banker & Co., San Francisco industrial realtors, entered into negotiations with the plaintiffs for the purchase of a 5-acre lot in the industrial subdivision referred to in finding 22. Mr. Bogart was acting as purchasing agent for the Stanley Steel Strapping Company, which was interested in establishing a plant in or near Pittsburg, California.

(b) During the course of the negotiations mentioned in paragraph (a) of this finding, Mr. Bogart and the plaintiff Joseph A. White, Jr., conferred with Dudley C. Dado, of the Industrial Department of the Southern Pacific Company, about obtaining permission for the establishment and maintenance of a private crossing of the two sets of railroad tracks along the north boundary of the subdivision, such crossing to be located so that it would provide direct access from California Boulevard to the 5-acre lot tentatively selected on behalf of the Stanley Steel Strapping Company and to a contiguous lot. (A private railroad crossing is one that is maintained by a private person or persons—as distinguished from a governmental unit—and can be used only with the express or implied permission of such person or persons.) Mr. Dado informed Messrs. Bogart and White that the Industrial Department approved the proposal and would recommend to higher authority that the Southern Pacific Company grant permission for the establishment and maintenance of the requested private crossing.

(c) After the conversation referred to in paragraph (b) of this finding, a 90-day option was taken on behalf of the Stanley Steel Strapping Company for the acquisition of the 5-acre lot at a price of $50,000. During the 90-day period of the option, Coldwell, Banker & Co. engaged a soils engineer to make a soils report, and arranged to have the 5-acre lot surveyed.

(d) At the end of the 90-day option period, the option to buy was exercised on behalf of the Stanley Steel Strapping

Company. Under the agreement, the transaction was to be closed within 30 days.

(e) Two days prior to the expiration of the 30-day period for the closing of the transaction between the plaintiffs and the Stanley Steel Strapping Company, Mr. Dado informed Messrs. Bogart and White that the Operations Department of the Southern Pacific Company had disapproved the request for a crossing of the railroad tracks at the desired place, on the ground that a crossing there would interfere with plans of the Southern Pacific Company to construct two additional sets of railroad tracks between the two existing sets of tracks on parcels M-1 and M-2, and to use the area of the easement on those parcels as a yard in which to hold or store railroad cars; and, accordingly, that the pending request for a crossing had been denied by the general manager of the company.

(f) After learning that the Southern Pacific Company would not grant a crossing of the railroad tracks at the place desired by the plaintiffs and the Stanley Steel Strapping Company, the agreement for the acquisition by that company of a 5-acre lot from the plaintiffs was cancelled on behalf of Stanley. The Stanley Steel Strapping Company subsequently acquired another lot in the Pittsburg area as the site for its new plant.

24. After learning from Mr. Dado that the Southern Pacific Company had denied the request for a crossing of the railroad tracks along the north boundary of the property in order to provide direct access from California Boulevard to the 5-acre lot selected on behalf of the Stanley Steel Strapping Company, the plaintiff Joseph A. White, Jr., sought the assistance of Robert M. Prendergast in connection with a further effort to obtain permission for the desired crossing. Mr. Prendergast talked with D. T. Daggett, of the Industrial Department of the Southern Pacific Company, and was informed that such company was unwilling to grant a request for a railroad crossing at

the place desired by the plaintiffs and the Stanley Steel Strapping Company because the Southern Pacific Company planned to construct, in the area of the requested crossing, a yard in which to hold or store railroad cars.

25. At the time of—or after—the refusal of the Southern Pacific Company to grant permission for the establishment and maintenance of a railroad crossing at the place desired by the plaintiffs and the Stanley Steel Strapping Company, the Southern Pacific Company informed the plaintiffs that it would be willing to grant permission for the establishment and maintenance of two railroad crossings in order to provide access from California Boulevard to parcels M-1 and M-2. One crossing, according to the Southern Pacific Company, could be established and maintained near the extreme western boundary of parcel M-1, and the other could be established and maintained near the extreme eastern boundary of parcel M-2. This has been the position of the Southern Pacific Company at all times material to the present litigation.

26.(a) By means of a letter dated July 25, 1963 and addressed to the San Francisco office of the GSA, the plaintiffs complained "that the Deed delivered by your department was not in accordance with the advertised offer of sale," and that "Instead of reserving an easement for railroad purposes twenty (20) feet in width, your Deed dated June 22, 1962, reserved an easement which is approximately seventy-nine (79) feet in width." The letter included a demand "for a Deed in conformance with the terms and conditions of sale."

(b) The defendant refused to comply with the plaintiffs' demand of July 25, 1963.

27.(a) The Southern Pacific Company has suggested to the plaintiffs a plan for the development of the M-1 and M-2 triangular area as an industrial park. The plan contemplates the construction by the plaintiffs of an access road from California Boulevard that would touch all the lots

in the area by crossing the railroad tracks near the northeast corner of the area, proceeding southward along the east side to the southeast corner of the area, running westward along the south side to the southwest corner of the area, and then crossing the railroad tracks to California Boulevard near the southwest corner of the area.

(b) The plan mentioned in paragraph (a) of this finding was not adopted by the plaintiffs because they had reason to believe that the expense involved in constructing the proposed access road, and the acreage covered or made unusable by the road, would have made it impossible to develop and sell the lands within parcels M-1 and M-2 at a profit.

28.(a) On October 14, 1963, the plaintiffs filed an action (No. 41832) in the United States District Court for the Northern District of California, Southern Division, seeking a reformation of the deed dated June 22, 1962, in so far as it related to parcels M-1 and M-2.

(b) The action referred to in paragraph (a) of this finding was dismissed by the District Court without prejudice on jurisdictional grounds.

29.(a) On February 17, 1964, the plaintiffs instituted in the United States District Court for the Northern District of California, Southern Division, an action (No. 42116) in mandamus and for declaratory relief with respect to the failure of the GSA to issue a deed respecting parcels M-1 and M-2 in conformity with the contract between the plaintiffs and the defendant for the purchase and sale of these parcels.

(b) The action referred to in paragraph (a) of this finding was dismissed by the District Court on jurisdictional grounds, and the dismissal was upheld by the United States Court of Appeals for the Ninth Circuit (343 F. 2d 444).

30.(a) In 1964, the Signode Steel Strapping Company, which desired to construct a new facility in or near Pitts-

burg, California, made an offer to the plaintiffs for the purchase of a block of lots totaling 20 acres within the industrial subdivision mentioned in finding 22, at a price of $12,500 per acre. Signode was aware of the difficulty previously encountered by the plaintiffs and the Stanley Steel Strapping Company in attempting to obtain permission for a crossing of the railroad tracks along the north boundary of the subdivision, but thought that the great volume of transportation business which Signode expected to generate would induce the Southern Pacific Company to grant permission for a railroad crossing which would provide direct access from California Boulevard to the 20-acre block. However, when the Southern Pacific Company was approached for permission to establish and maintain a crossing of the railroad tracks in order to provide direct access to the 20-acre block from California Boulevard, the Southern Pacific Company refused to grant such permission. Signode then withdrew its offer for the purchase of the 20-acre block from the plaintiffs.

(b) Subsequently, the Signode Steel Strapping Company purchased other land in the Pittsburg area for the construction of its new facility.

31. In 1966, the Triangle Conduit & Cable Company entered into an agreement with the plaintiffs for the purchase of a 6-acre lot within the industrial subdivision mentioned in finding 22, at a price of $65,000. However, after Triangle learned at a conference with the Southern Pacific Company that the latter would not grant permission for a crossing of the railroad tracks along the north boundary of the property in order to provide direct access from California Boulevard to the 6-acre parcel, the agreement between Triangle and the plaintiffs was cancelled by Triangle.

32. On January 21, 1966, the plaintiffs timely filed the present action in this court.

33.(a) Two 20-foot railroad easements for the two sets of existing railroad tracks on parcels M-1 and M-2 would have covered a total of 2.95 acres.

(b) The 79-foot railroad easement on parcels M-1 and M-2 which the defendant reserved in the deed dated June 22, 1962 for the two sets of existing railroad tracks, together with the area between the two sets of tracks, covered a total of 5.55 acres.

34.(a) On the basis of the plaintiffs' plan for the industrial development of the triangular area which parcels M-1 and M-2 comprise (see finding 22), the plaintiffs would have had 46.35 acres of usable and salable land lying south of the two sets of railroad tracks running along the north boundary of the property.

(b) The proper development of the 46.35 acres in accordance with the plaintiffs' basic plan, and the sale of such acreage, would have cost the plaintiffs a total of approximately $156,635, as follows:

| | |
|---|---|
| Engineering and Map Filing | $ 4,000 |
| Railroad Crossings | 99,000 |
| Interest on Investment [2] | 29,160 |
| Selling Costs | 24,475 |
| Total | $156,635 |

[2] Computed at the rate of 6 percent per year for 2 years on the purchase price of $140,000 and development costs totaling $103,000.

(c) The figure of $99,000 in paragraph (b) of this finding includes the estimated cost of properly constructing five grade crossings at the places contemplated in the plaintiffs' plan of industrial development and providing adequate warning devices for the protection of persons and vehicles using the crossings in connection with the transaction of business with the owners of the industrial lots. However, see finding 35.

(d) The usable and salable acreage within the industrial subdivision, if properly developed in accordance with the

plaintiffs' plan, could have been sold as of September 1962 at an average price of about $10,000 per acre. Thus, the 46.35 usable acres could have been sold for a total price of about $463,500. This amount, less the costs of purchasing, developing, and selling the acreage (i.e., $140,000 plus $156,635, or a total of $296,635), would have represented a profit of $166,865 to the plaintiffs.

35. If the defendant, in deeding parcels M-1 and M-2 to the plaintiffs, had reserved two 20-foot railroad easements for the two sets of existing railroad tracks on these parcels, in accordance with the contract of purchase and sale between the plaintiffs and the defendant, there would have been no basis for a plan by the Southern Pacific Company to build additional tracks on parcels M-1 and M-2 and to use the trackage on these parcels for a yard in which to hold or store railroad cars. On the other hand, the plaintiffs have not proved by a preponderance of the evidence that it would have been feasible in such a situation to establish and maintain five crossings of the existing sets of railroad tracks on parcels M-1 and M-2 at the places contemplated in the plaintiffs' plan for the industrial development of the area (see finding 22), without interfering unduly with the expected use of the existing sets of railroad tracks for active railroad operations.

30.(a) If the M-1 and M-2 industrial subdivision had been developed by the plaintiffs on the basis of two railroad crossings, one at the western extremity of parcel M-1 and the other at the eastern extremity of parcel M-2, and the construction of an access road similar to that suggested by the Southern Pacific Company (see finding 27), the plaintiffs would have had 37.76 acres of usable and salable land, since the two sets of railroad tracks and the area between the two sets of tracks covered a total of 5.55 acres and the access road would have covered or made unusable a total of 8.59 acres.

(b) The 37.76 usable and salable acres within the industrial subdivision, if properly developed, could have been

sold as of September 1962 at an average price of about $10,000 per acre. Thus, the total usable acreage could have been sold for a total price of about $377,600.

(c) The proper development of the industrial subdivision on the basis of the two railroad crossings and the access road, and the sale of such acreage, would have cost the plaintiffs a total of approximately $244,932.96, as follows:

| | |
|---|---|
| Engineering and Map Filing | $ 4,000.00 |
| Railroad Crossings | 39,600.00 |
| Access Road | 143,233.00 |
| Interest on Investment | 39,219.96 |
| Selling Cost | 18,880.00 |
| Total | $244,932.96 |

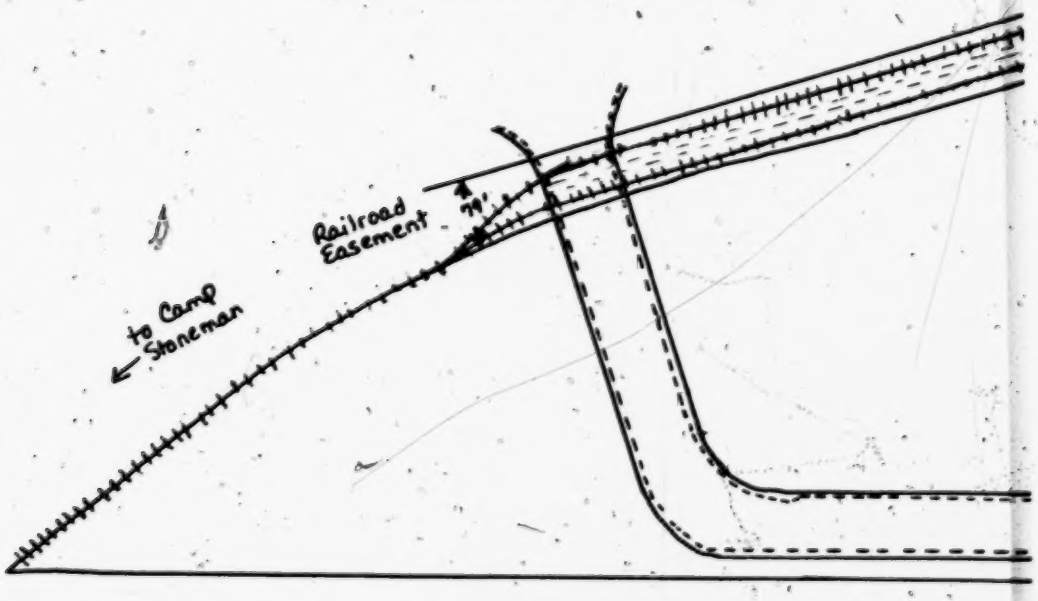
(d) Thus, parcels M-1 and M-2, subject to the 79-foot railroad easement covering the existing trackage and the area between the two sets of tracks, had a fair market value of approximately $132,667.04 as of September 1962.

## Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are entitled to recover, and it is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of seven thousand three hundred dollars ($7,300).

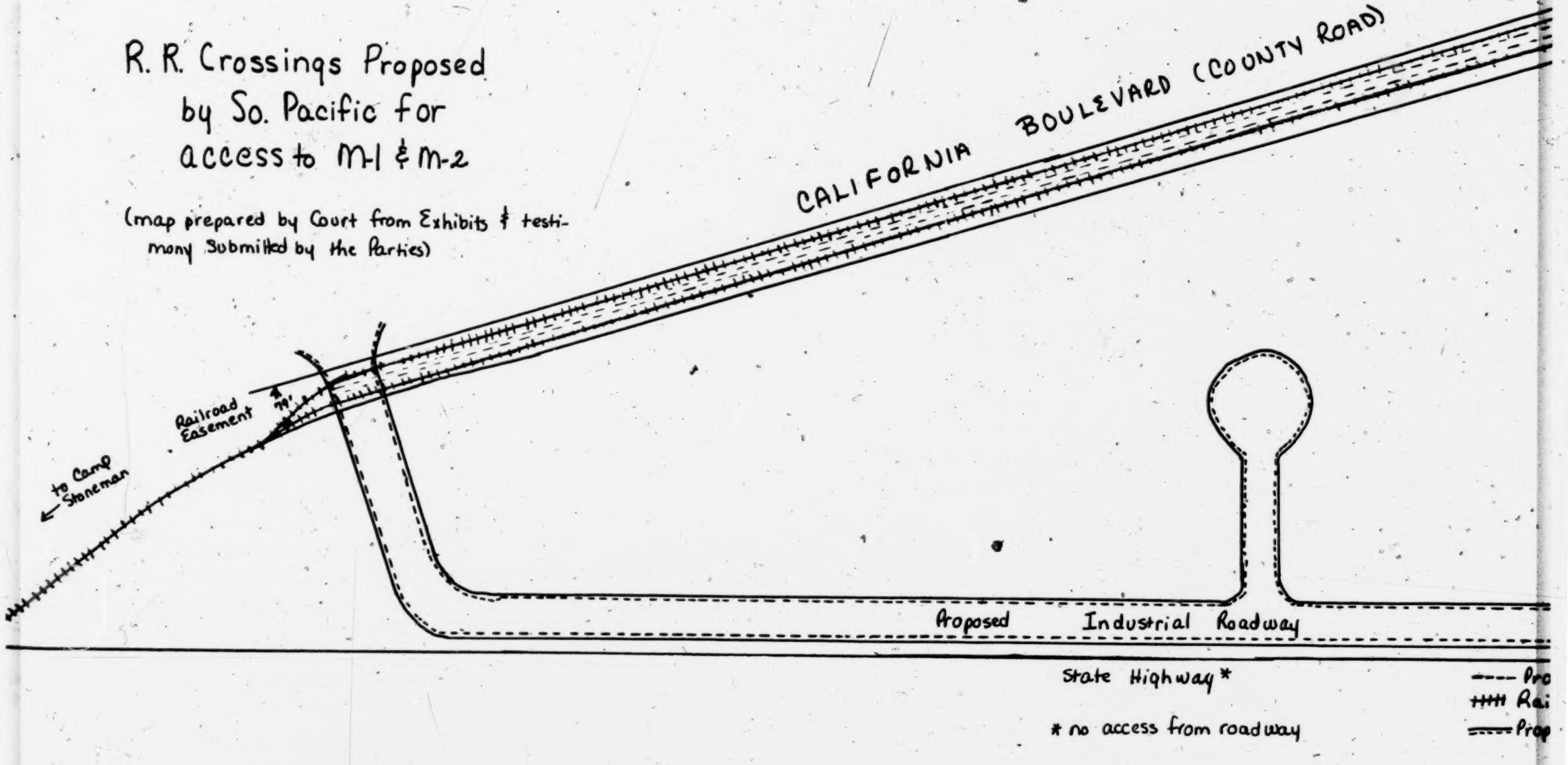
# R. R. Crossings Proposed by So. Pacific for access to M-1 & M-2

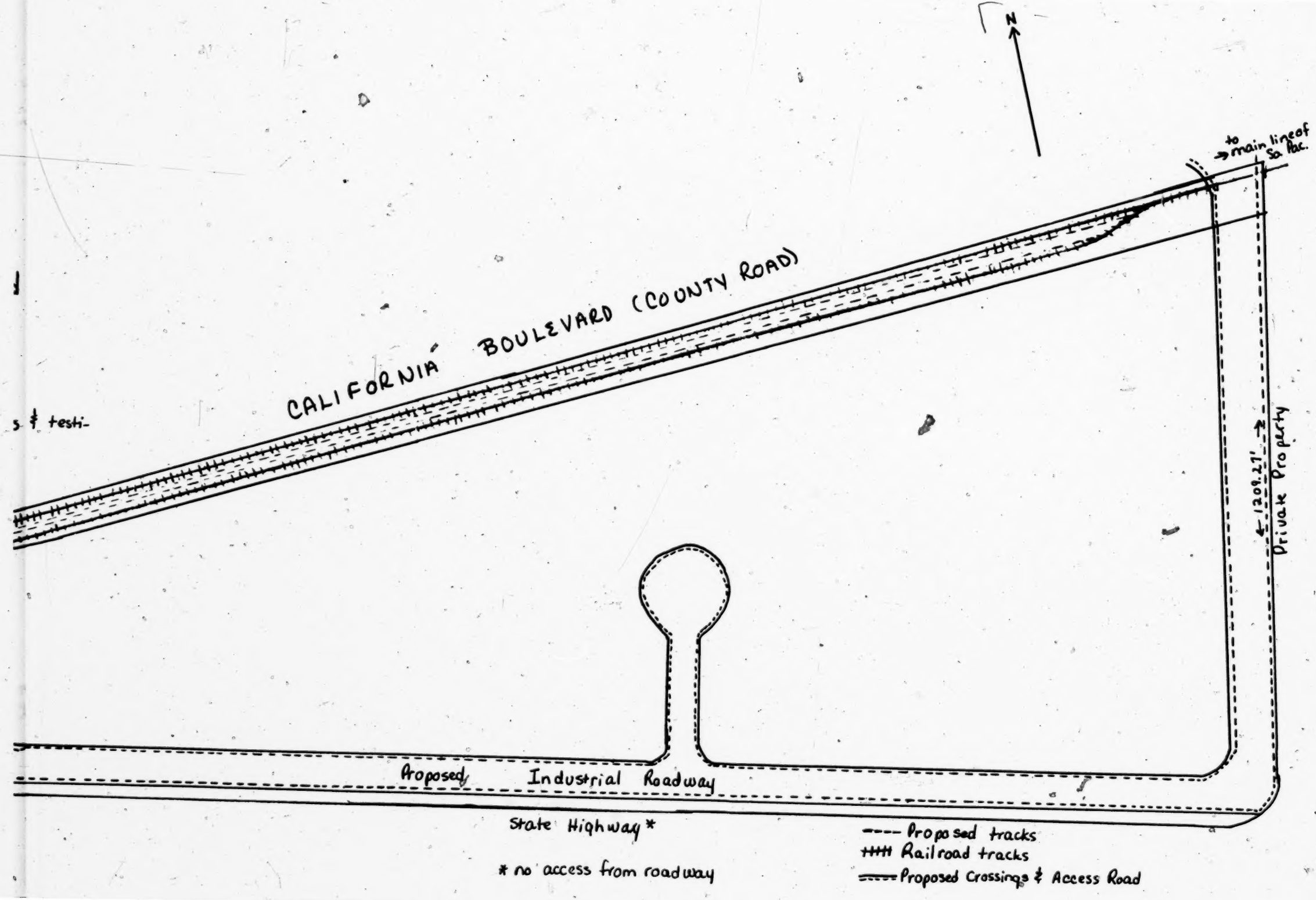
(map prepared by Court from Exhibits & testimony submitted by the Parties)



# R. R. Crossings Proposed by So. Pacific for access to M-1 & M-2

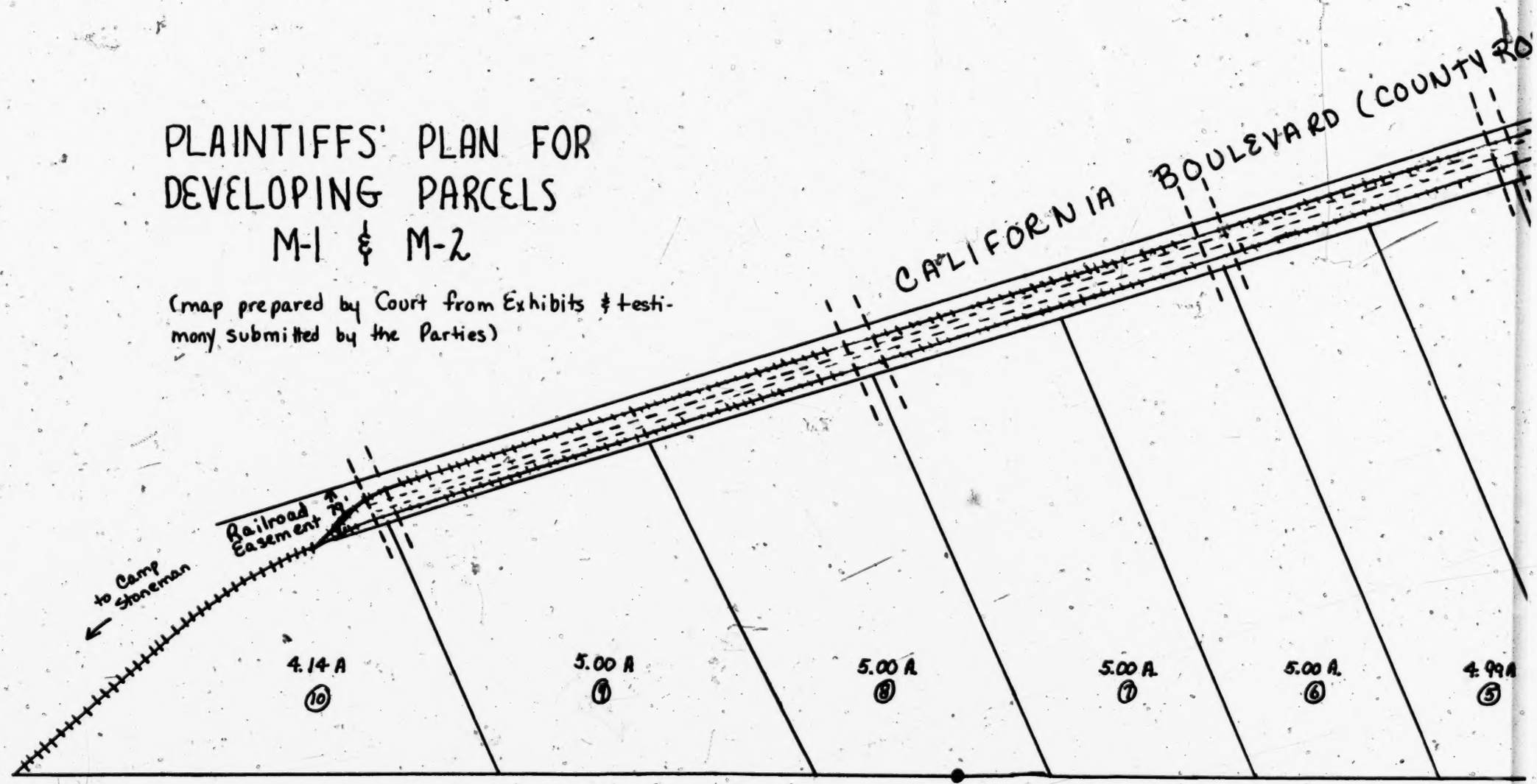
(map prepared by Court from Exhibits & testimony Submitted by the Parties)




N
to main line of So. Pac.
CALIFORNIA BOULEVARD (COUNTY ROAD)
s & testi-
1209.21'
Private Property
Proposed Industrial Roadway
State Highway *
* no access from roadway
---- Proposed tracks
++++ Railroad tracks
===== Proposed Crossings & Access Road

# PLAINTIFFS' PLAN FOR DEVELOPING PARCELS M-1 & M-2

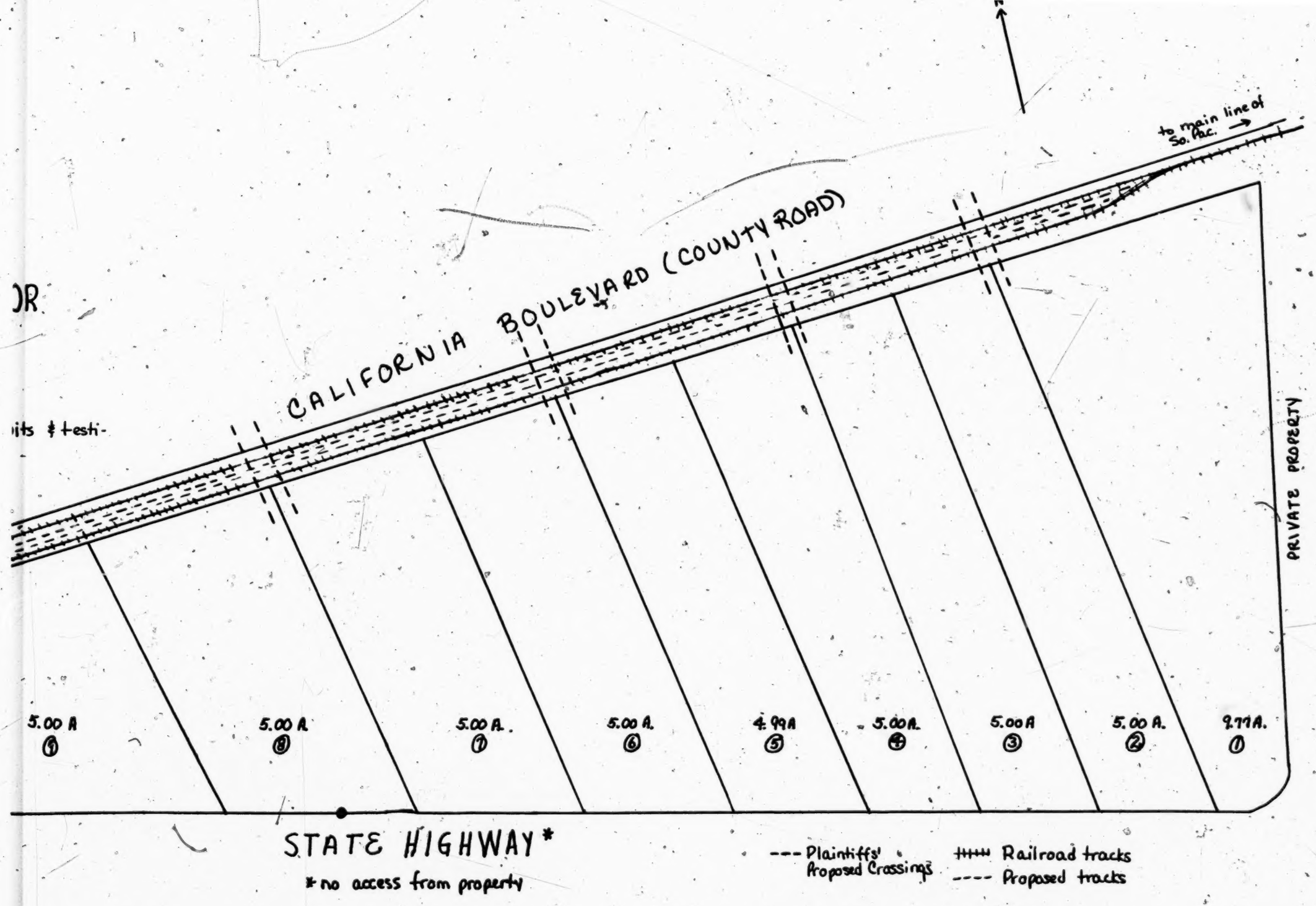
(map prepared by Court from Exhibits & testimony submitted by the Parties)




Scale: 1" = 160'

* no access from property

348-576 O - 69 (Pol. text) No. 1


to main line of So. Pac.
CALIFORNIA BOULEVARD (COUNTY ROAD)
PRIVATE PROPERTY
5.00 A ⑨
5.00 A ⑧
5.00 A. ⑦
5.00 A. ⑥
4.99A ⑤
5.00A. ④
5.00 A ③
5.00 A. ②
9.11A. ①
STATE HIGHWAY*
*no access from property
--- Plaintiffs' Proposed Crossings
Railroad tracks
---- Proposed tracks

SUPREME COURT, U. S.

No. 362

# In the Supreme Court of the United States

OCTOBER TERM, 1969

JOSEPH A. WHITE, JR., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*

MYLES J. AMBROSE,
*Assistant Attorney General,*

ROGER P. MARQUIS,
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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 566

JOSEPH A. WHITE, JR., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 29a–41a) is reported at 410 F. 2d 773.

### JURISDICTION

The judgment of the Court of Claims was entered on May 16, 1969. On August 14, 1969, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including September 8, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.



365-504—69

## QUESTION PRESENTED

Whether the Court of Claims correctly determined the amount of damages to which petitioners were entitled as a result of the government's partial breach of a contract for the sale of real property.

## STATEMENT

This case involves a sale by the General Services Administration of two contiguous parcels of land, containing about 32 acres, which were determined to be surplus to the needs of the United States. Petitioners entered into a contract of sale with G.S.A. on June 8, 1962, which specified that the land was subject to two 20-foot railroad easements running along the northern boundary of the property. As a result of a lack of coordination among the personnel of the General Services Administration, rather than of any intentional wrongdoing (Pet. App. 32a), the petitioners' contract was inconsistent with a contract which had been entered into three months earlier with the Southern Pacific Company in which the G.S.A. had agreed to sell an undivided 79-foot easement for railroad tracks, which included the two 20-foot easements reserved in petitioners' contract as well as the strip of land between them. Faced with this dilemma, the General Services Administration determined that it would honor its earlier contract with the Southern Pacific Company, whereupon the petitioners brought an action in the district court to compel the G.S.A. to execute a deed to the property which conformed to their contract. This action was ordered dismissed on the ground that the United States was a necessary

party to the suit. *White* v. *Administrator of General Services Administration*, 343 F. 2d 444 (C.A. 9). Thereafter, the present suit for damages was instituted in the Court of Claims.

The Court of Claims determined that the issue before it was the factual question "what difference, if any, exists between the fair market value of the property" subject to the two 20-foot easements specified in the contract and to the single 79-foot easement reserved in the deed (Pet. App. 35a). The court found that all petitioners lost as a result of the breach of contract was the narrow 39-foot strip between the two easements, containing 2.6 acres, and that there was no evidence of any use to which plaintiffs could have put this strip (Pet. App. 40a–41a). The court concluded that petitioners were entitled to $7,300 in damages for the loss of the medial strip, which "reflects a finding that the difference in the two values is relatively slight because the difference in the burdens on the servient tenament as between the two easements is likewise slight" (Pet. App. 35a).

## ARGUMENT

As the Court of Claims correctly stated, this case involves a factual determination of the diminution in the value of land resulting from the government's failure to convey title to a narrow strip of land between two railroad easements. The court concluded that the plaintiffs suffered minimal damages, in view of the absence of evidence of any use to which the strip could be put to enhance the value of the much larger

tract from which it was separated. There is no occasion for further review of the court's resolution of this factual question.

Contrary to petitioners' argument, there is no inconsistency between the court's findings and its conclusion as to the amount of damages suffered by petitioners. As the court recited in its findings (Pet. App. 26a–27a; see Pet. 4–5), petitioners' claim for $170,000 in damages reflects a loss of anticipated profits premised on the expectation that petitioners would have been able to construct five access roads across the two railroad tracks which were the subject of separate easements in the contract; petitioners contended that the sale to the railroad of an easement for the medial strip, on which it contemplated the construction of two additional tracks, defeated petitioners' expectation because the railroad then was willing to agree only to a more limited, and more expensive, arrangement for access roads. The court specifically found, however, that petitioners' expectation was unjustified, in view of the fact that the construction of access roads required a separate agreement with the railroad, which intended to continue using the tracks, and that there was no substantial evidence that petitioners could have secured the railroad's agreement to allow five crossings, or any other less expensive arrangement, even if the larger easement had not been granted (Pet. App. 54a).

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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